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MODERN REPORTS;

OR,

SELECT CASES

ADJUDGED IN

THE COURTS

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VOLUME THE FIRST.

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CONTAINING,

Cases adjudged in the Courts of KING'S BENCH, COMMON PLEAS, EXCHEQUER, and CHANCERY, from the Restoration of CHARLES THE SECOND to the Thirtieth Year of CHARLES THE SECOND.

THE FIFTH EDITION,

CORRECTED:

WITH THE ADDITION OF MARGINAL REFERENCES AND NOTES,

By THOMAS LEACH, Esq.

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

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JUL 15 1901

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TO THE

FIRST EDITION.

THESE REPORTS, the firſt, except the LORD CHIEF JUSTICE VAUGHAN's Arguments, that have been yet printed of Caſes adjudged ſince His Majeſty's happy Reſtoration; though they are not publiſhed under the name of any eminent perſon, as ſome other ſpurious ones have been, to gain thereby a reputation, which in themſelves they could not merit; were collected by a perſon of ability and judgment, and communicated to ſeveral of known learning in the law, who think them not inferior to many books of this nature which are admitted for authorities. A great and well-ſpread name may be requiſite to render a book authentic, and to defend it from that common cenſure of which this age is become ſo very liberal; but its own worth is that only which can make it uſeful and inſtructive.

THE READER will find here ſeveral Caſes (as well ſuch as have been reſolved upon our modern acts of parliament, as others relating to the common law)

which are *primæ impreſſionis*, and not to be found in any of the former volumes of the law; and the pith and ſubſtance of divers arguments, as well as reſolutions of the reverend Judges on many other weighty and difficult points.

See Mr. Juſtice Foſter's obſervation upon Strange's Reports.

AND, indeed, though in every caſe the main thing which it behoves us to know is, What THE JUDGES take and define to be law; yet the ſhort and conciſe way of reporting it, which is affected in ſome of our books, doth very ſcantily anſwer the true and proper end of reading them; which is not only to know what is law, but upon what grounds and reaſons it is adjudged ſo to be: otherwiſe THE STUDENT is many times at a loſs and left in the dark; eſpecially where he finds other reſolutions which ſeem to have a tendency to the contrary opinion.

IN this reſpect, theſe REPORTS will appear to be more ſatisfactory and enlightening than many others: ſeveral of the Caſes (eſpecially thoſe of the moſt important conſideration) containing, in a brief and ſummary way, what hath been offered by the counſel *pro* and *con*, and the debates of the reverend Judges as well as their ultimate reſolutions; than which nothing can more contribute to the advantage of the ſtudious reader, and to the ſettling and guidance of his judgment, not only in the point controverted, but likewiſe in other matters of law where the reaſon is the ſame. *Ubi eadem ratio, idem jus.*

AS to *the truth* of theſe REPORTS, though the modeſty of the gentleman who collected them hath prevailed

vailed above the importunity of the bookſeller, and he hath rather choſen to ſee his book than himſelf to gain the public acceptation and applauſe, whereby it hath loſt ſome ſeeming advantage which the prefixing of his name would have undoubtedly given it; yet the reader may reſt aſſured, that no little care hath been taken to prevent any miſtakes or miſrepreſentations; the judgments having been examined, and the authorities here cited induſtriouſly compared with THE BOOKS out of which they were taken.

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TO THE

PRESENT EDITION.

THE laſt Edition of THE MODERN REPORTS was publiſhed about thirty years ago, in ſeven volumes folio, under the auſpices of MR. PICKERING's name; and, in the title-page, *it is ſaid*, that *many thouſands* of new and *proper* references had been added. To theſe ſeven volumes the induſtry of ſeveral later Reporters has added five more; but in the margins of theſe five volumes a very few ſolitary references only are to be found. The whole work contains, *at preſent*, a valuable collection of Select Caſes in Law and Equity, from the Reſtoration of Charles the Second to the death of George the Firſt; the merit of which, and their long admitted authority in the ſuperior courts, are too well known to require obſervation.

The promiſed aſſiſtance of ſeveral reſpectable characters in the profeſſion has excited the hope of amaſſing a ſufficient collection of *unreported Caſes*, to enable the proprietors to continue the work, by an additional volume, through the ſeveral chaſms which have been left open by ſubſequent reporters, to the commencement of THE TERM REPORTS. But this hope, however rational and well founded it may now be, obviouſly depends upon

upon contingencies too precarious and remote, to render its final accompliſhment certain or ſecure.

THE TWELVE VOLUMES, however, are at preſent out of print; and the public demand for them, operating on their ſcarcity, is gradually ſuperinducing premiums upon their original value. This conſideration, conjoined with the idea of introducing into the work the many judicial and parliamentary alterations which ſeveral of the points of law have undergone ſince its *firſt* publication, has ſuggeſted the idea of furniſhing the profeſſion with a new, and a more uſeful edition of this work.

THE TEXT of the laſt Edition, in the collocation of words, and in the punctuation of the ſentences, is in ſeveral places very imperfect: It has therefore been carefully collated with that of the original impreſſion, and the alterations marked between hooks, or noticed in the margin.

A variety of Caſes, without any name to them, are frequently crowded together in ſo confuſed a heap, that, in the firſt ſeven volumes, the marginal references of one Caſe are not, at firſt ſight, clearly diſcernible from thoſe of another: this aggregation has been ſeparated, and the reſpective Caſes diſtinguiſhed by the title "ANONYMOUS," except where, on comparing them with contemporary Reporters, the true and real name of the Caſe has been diſcovered.

A very imperfect and frequently erroneous abſtract of the ſeveral points which the Caſes contain, appears in the margin of the old editions; theſe therefore have been

been entirely expunged, and a new epitome extracted to ſupply their places.

In the arguments of counſel, and ſometimes in the deciſions of the Court, the perſons delivering their opinions are deſcribed by their TITLES inſtead of their NAMES, as *Mr. Attorney*, *Mr. Solicitor*, *The Chief Juſtice*, *The Court*, &c. leaving it uncertain who they were. To ſupply this defect, at the commencement of every Term the names of the ſeveral Judges of the court in which the queſtion is debated, as well as thoſe of THE ATTORNEY and SOLICITOR GENERAL of the time have been prefixed, in the ſame manner as in Sir JOHN STRANGE's Reports.

THE MARGINAL REFERENCES, as far as Mr. PICKERING's publication extends, are certainly very numerous; but the general complaint of the profeſſion is, that many of them are either inapplicable, or made to books of doubtful authority. An attempt, however, to diſplace the labours of ſo eminent an editor would perhaps appear invidious and arrogant. The Marginal References as they ſtand in the firſt ſeven volumes have, therefore, been left untouched, except only thoſe which, upon a very careful examination, appear to have no relation whatever to the ſubject they are deſigned to illuſtrate, and except altering the circumlocution with which ſome of them are expreſſed; as 1. *Mod. Caſes in Law and Equity —Caſes Temp. Mac.—Caſes Temp. Qu. Ann.—Caſes Temp. Will.* 3.—into the more appoſite and laconic abbreviations of 8. *Mod.* 10. *Mod.* 11. *Mod.* and 12. *Mod.*—

THE NOTES which accompany ſuch of the *Caſes* as ſeemed to the Editor to require explanation, are placed ſeparately at the bottom of each Caſe; and theſe Notes, perhaps,

perhaps, form the moſt important *novelty* of the preſent edition.

It is well known, that moſt of the Caſes, eſpecially in the firſt volumes of the work, are differently reported by many contemporary Reporters; theſe ſeveral Reports of the ſame Caſe therefore have been compared with each other, and the material points in which they differ, and in which they agree, marked out, and accompanied by references to ſuch Caſes as appear to confirm or contradict the deciſion of the Court.

The alterations which the determinations of the Courts and the Acts of the Legiſlature have ſince made upon the Law of the Caſe, are alſo introduced; and in order to render the NOTES more full and complete, a reference is made to ſuch Caſes as appear to have any analogy to the ſubject.

To thoſe Volumes where the INDEXES are neither copious nor exact, new Indexes are ſubjoined, accompanied by a Table of the Caſes reported.

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MICHAELMAS TERM,

The Twenty-Firſt of Charles the Second.

IN

The King's Bench.

Saturday, 23 *October*, 1669.

Sir John Kelynge, *Knt. Chief Juſtice*,

Sir John Twiſden, *Knt.*
Sir William Moreton, *Knt.*
Sir Richard Rainsford, *Knt.* } *Juſtices.*

Sir Jeoffry Palmer, *Knt. Attorney General.*
Sir Heneage Finch, *Knt. Solicitor General.*

* Mynn's Caſe.

Caſe 1.

MYNN, an attorney, entered a judgment, by colour of a warrant of attorney, of another Term than was expreſſed in the warrant.—THE COURT conſulting with the Secondary about it, he ſaid, that if the warrant be to appear and enter judgment as of this Term, *or at any time after*, the attorney may enter judgment at any time during his life. But in the caſe in queſtion the warrant of attorney had not theſe words, "*or at any time after*:" wherefore The Secondary was ordered to conſider the charge of the party grieved, in order to his reparation; which, THE COURT ſaid, concluded him from bringing his action on the caſe.

At what time judgment may be entered on a warrant of attorney.

10. Mod. 1. 43. 263. 1. Vent. 310. Stra. 718. 1247. Ld. Raym. 849. 1. Wilſ. 258.

If the warrant be *ſpecial* or *conditional*, the entry of the judgment muſt be according to the terms mentioned in it. Salk. 400. 1. Vent. 113. 1. Sid. 222. Barnes Notes, 37. 2. Black. 780. But if the warrant be *general*, judgment may be entered upon it at any time within the firſt four Terms. 1. Cromp. Pract. 315. If it be above *a year* old, then permiſſion muſt be firſt obtained from the Court on affidavit. Barnes Notes, 3d edit. 36. 38. 50. 256. 1. Cromp. Pract. 310. 5. Com. Dig. "Pleader" (Y 2.). 1. Term Rep. 80.

Caſe 2.

Memorandum.

If a *habeas corpus* be returnable in *Michaelmas* or *Eaſter Terms*, the defendant is not entitled to an *imparlance*.

THE SECONDARY ſaid, that in *Trinity* and *Hilary Terms* they could not compel the party in a *habeas corpus* to plead and go to trial the ſame Term; but that in *Michaelmas* and *Eaſter Terms* they could. 7. Mod. 56. 117. Ld. Raym. 817.

This practice is now altered by a rule Trinity 5. & 6. Geo. 2. See Richardſon's Pract. 428. Cromp. Prac. 411. Impey, 623. and Tidd's Pract. 242, 243.

Caſe 3.

Anonymous.

Exceſſive damages no ground for a new trial. Raym. 77. 10. Mod. 202.

* MR. SOLICITOR moved for a new *writ of enquiry* into *London*, and to ſtay the filing of a former, becauſe of *exceſſive damages* given; but it was denied. 8. Mod. 197. 213. 12. Mod. 85. 127. Strange, 125. 1259. Barnes Notes, 3d edit. 229, 230. 318. 436. 445.

* [2] NOTE, The Court have a power *in all caſes* of exceſſive damages to grant a NEW TRIAL. 1. Term Rep. 277. In perſonal torts, however, and in all actions where it is the peculiar and ſtrict province of the jury to eſtimate the extent of the injury, they will not diſturb a verdict becauſe the damages are exceſſive, except they appear to have been given from paſſion, partiality, or prejudice. 1. Burr. 609. Cowp. 230.—See alſo Salk. 647. Ld. Raym. 63. 1. Wilſ. 61. 2. Wilſ. 372. 405. 3. Wilſ. 61. Burr. 2226. Dougl. 314. 510. Sayer's Law of Damages, p. 210. to 238. 2. Term Rep. 166.

Caſe 4.

The King *againſt* Webb.

Venue changed by *the King* before appearance.

AN AFFIDAVIT for changing of *a venue* made before the party was arreſted; and allowed.—S. C. 1. Vent. 17. S. C. 1. Sid. 412. S. C. 2. Keb. 386. 2. Salk. 668.

But in the caſe of *common perſons* it is now ordered, by rule Eaſter 24. Car. 2. that the defendant ſhall not move to change *the venue* in any action until his *appearance* be entered. Lofft, 321. 227. Impey's Practice, 5th edit. 167. Wil. 245. Stra. 211. 858. Say. 77. 207. Cowp. 511. 51. 1. Term Rep. 635.

Caſe 5.

Anonymous.

No bail in battery. 6. Mod. 230.

MOVED in battery, for putting an arm out of joint, that the party might be held to ſpecial bail; but denied.—TWISDEN, *Juſtice*. Follow the courſe of the court. 2. Roll. 335. fol. 14. Inſt. Leg. 20. 1. Lev. 39. 2. Ld. Raym. 767. Barnes Notes, 47. 55 58. 78. Sid. 276. 307. Comb. 57. Salk. 101. 1. Bac. Abr. 209. 1. Black. Rep. 192.

Caſe 6.

Hillary *againſt* Hawkſworth.

The *ſeſſions* may diſcharge an apprentice from his maſter, and order a portion of the fee to be returned. Poſt. 287.

MR. SAUNDERS moved to quaſh an order made by the juſtices of the peace for putting away an apprentice from his maſter, and ordering the maſter to give him ſo much money.—KELYNGE, *Chief Juſtice*. The ſtatute of 5. *Eliz.* c. 4. ſ. 35. leaves this to their diſcretion. 1. Saund. 313, 314. 1. Salk. 67, 68. 2. Salk. 490, 491. 2. Ld. Raym. 1410.

There are notes of this Caſe 1. Sid. 411. 2. Keb. 541. 592. and it is very fully reported 1. Saund. 313. The Court were unanimous, that the juſtices have a diſcretionary power either to inflict corporal puniſhment or to diſcharge a bad apprentice; but that where the complaint is againſt the maſter, they can only diſſolve the indentures; and that the reſtoration of the money is conſequential to their juriſdiction to diſcharge. See the 20. Geo. 2. c. 29.—2. Salk. 68. Strange, 143. 663. 2. Ld. Raym. 1410. 5. Mod. 239. and Mr. Conſt's Edition of Bott's Poor Laws, vol. I. page 503 to 519. where all the Caſes upon this ſubject are collected.

Anonymous.

Case 7.

Franchiſe. Poſt. 118. 12. Mod. 535. 2. Com. Dig. 393, 394. 410. and ſee Rex v. Gough, Dougl. 792. to 798.

AN INDICTMENT was preferred in *Cheſter* for perjury committed in *London*; for which KELYNGE, *Chief Juſtice*, threatened to have the liberties of the *county palatine* ſeized, if they kept not within their bounds.

Goodwin *againſt* Harlow.

Case 8.

Judgment reverſed for want of an *appearance* entered. 1. Roll. 888. 1. Vern. 223.

ERROR to reverſe a judgment in *Colcheſter*; there being no appearance by the party, but judgment upon three defaults recorded. Reverſed.—TWISDEN, *Juſtice*. If there be a judgment againſt three, you cannot take out execution againſt one or two (*a*).

(*a*) 1. Ld. Raym. 244. Comb. 441. 1. Salk. 312. 5. Mod. 338. Carth. 404. 3. Danv. Ab. 332. p. 6. Show. 405. Dougl. 627. But for Caſes in which the execution *muſt* be joint, and where it *may* be ſeveral, *vide* Crompt. Pract. 347, 348.

Anonymous.

Case 9.

A fine without a deed to lead the uſes, ſhall be taken to the uſe of the conuſor and his heirs.—No new trial ſhall be granted where the verdict does ſubſtantial juſtice.

TWISDEN, *Juſtice*, upon a motion for a NEW TRIAL, ſaid, that in his practice the heir, in an action of debt againſt him upon a bond of his anceſtor, pleaded *riens per diſcent*; the plaintiff knew that the defendant had levied a fine, and at the trial it was produced: but becauſe they had not a deed to lead the uſes, it was urged that the uſe was to the conuſor and his heirs, and ſo the heir in *by diſcent (a)*; whereupon there was a verdict againſt him. And it being a juſt and due debt, they could never after get *a new trial (b)*.

(*a*) By 29. Car. 2. c. 3. ſ. 10. & 11. if any *ceſtui que truſt* leave a truſt in fee ſimple to deſcend to his heir, it ſhall be taken to be aſſets *by deſcent*, and liable to execution for a debt of the anceſtor in whoſeſoever hands ſuch lands by deſcent ſhall come after the writ purchaſed: And by 3. & 4. Will. & Mary, c. 14. in all caſes where any heir at law ſhall be liable to the debt of his anceſtor, in reſpect of any lands deſcending to him, and ſhall convey them away before action brought, he ſhall be liable to the value of the lands ſo conveyed, &c. See poſt. 853. Carth. 245. 1. Peer. Wms. 294. 3. Peer. Wms. 399. 3. Bac. Abr. 26. 1. Eq. Abr. 149. 5. Mod. 122. Comb. 344. 2. Chan. Caſ. 175. 2. Vern. 62. Douzl. 45.

(*b*) See 12. Mod. 439. 11. Mod. 52. 111. 141. 206. Fitzg. 40. Salk. 653. 646. Stra. 101. 899. 1238. Ld. Raym. 62. 514. 1. Peer. Wms. 212. 673. 2. Peer. Wms. 426. 564. Burr. 2257. Cowp. 37 The Caſes of Aſhley v. Aſhley, and Smith v. Huggins, 2. Strange, 1142.; Edmonſon v. Machell, 2. Term Rep. 4.; and Wilkinſon v. Payne, 4. Term Rep. 468.

* [3]

* Goſtwicke *againſt* Maſon.

Case 10.

In debt upon a leaſe for three years rent, the want of an averment of the *continuance in poſſeſſion* is aided by the verdict.—S. C. 1. Sid. 423. S. P. 6. Co. 35. Cro. Eliz. 775. See alſo Lutw. 66. 2. Danv. 508. pl. 6. S. C. 1. Vent. 41. 10. Mod. 69, 70. 162. 12. Mod. 7. 1. Ld. Raym. 746. 2. Stra. 776. Salk. 69, 70. 414. 3. Bac. Abr. 434. Dougl. 455. 1. Term Rep. 380. 3. Term Rep. 13. 349.

DEBT FOR RENT upon a leaſe for a year, and ſo from year to year, *quamdiu ambabus partibus placuerit*. There was a verdict for the plaintiff for two years rent.—SAUNDERS moved in ar-

Gostwicke *againſt* Mason.

reſt of judgment, that the plaintiff alledges indeed that the defendant entered and was poſſeſſed the firſt year, but mentions no entry as to the ſecond.—Twisden, *Juſtice*. The jury have found the rent to be due for both years, and we will now intend that he was in poſſeſſion all the time for which the rent is found to be due.

Caſe 11.

Bates *againſt* Kendal.

Teaching ſchool without licence.

A PROHIBITION was prayed to the eccleſiaſtical court at *Cheſter* to ſtay proceedings upon a libel againſt one *William Bates*, for teaching ſchool without *licence*; but it was denied.

S. C. 1. Vent. 41.

S. C. 2. Keb. 538. 544. 2. See the ſtatutes 1. Jac. 1. c. 4. ſ. 9. and 19. Geo. 3. c. 44. 1. Hawk. 18. and 48.

It appears by the report of this caſe in *Keble*, that the prohibition was *granted*, becauſe the object of the libel was to *put him out* of the ſchool, when the patronage was not in the *ordinary*, but in *the founder*; in which caſe the ordinary can only *cenſure*, but not *expel*; nor can he libel for the penalty. Carthew, 484. 2. Lev. 222.—This juriſdiction extends only to *grammar-ſchools*. 1. Peer. Will. 20. 32.—See an argument but no determination upon this ſubject, Salk. 672. 12. Mod. 192.—And as to the biſhop's *duty* in granting the licence, *vide* 2. Bar. 365. 428. 2. Kel. 287. pl. 218. and 367. and Strange, 1023.

Caſe 12.

Redman *againſt* Edolfe.

Trinity Term, 21. *Car.* 2. *Roll* 799.

The court will preſume an *original* to be perfect until the contrary appears.

TRESPASS and EJECTMENT by *original* in this court.—Saunders moved in arreſt of judgment, upon a fault in the original; for a bad original is not helped by verdict. But upon Mr. Livesay's certifying that there was no original at all, the plaintiff had judgment, though in his declaration he recited the original.

S. C. 1. Sid. 423.

S. C. 1. Saund. 317. S. C. 2. Keb. 544. 583. Cro. Jac. 108. 4. Mod. 246. Tidd's Pract. 222.

See alſo the ſtatute 18. Eliz. c. 14. by which it is enacted, that no judgment ſhall, *after verdict*, be ſtayed or reverſed for any default in form, or for the want of any original writ, &c. 5. Co. 37. Barnes Notes, 3d edit. 14, &c. 1. Ld. Raym. 565. 2. Ld. Raym. 1058. 1066. Stra. 1211 1. Wilſ. 1. 2. Wilſ. 147. 2. Burr. 1162. 4. Burr. 2448. Cowp. 841. Dougl. 62. 228. 1. Term Rep. 149.

Caſe 13.

Tuberville *againſt* Savage.

If a man lay his hand upon his ſword and ſay, "If it were not "aſſize-time, I "would not "take ſuch "language," this is no aſſault.

S. C. 2. Keb. 545. 3. C. 1. Vent. 256. 2. Ro. Ab. 547. 6. Mod. 149. 10. Mod. 187. 1. Lev. 282.

ACTION of *aſſault*, *battery*, and *wounding*. The evidence to prove a provocation was, that the plaintiff put his hand upon his ſword and ſaid, "*If it were not aſſize-time, I would not take ſuch language from you.*"—The Question was, If that were an aſſault?—The Court agreed that it was not; for the declaration of the plaintiff was, that he would not aſſault him, the Judges being in town; and *the intention* as well as *the act* makes an aſſault. Therefore if one ſtrike another upon the hand, or arm, or breaſt in diſcourſe, it is no aſſault, there being no *intention* to aſſault; but if one, intending to aſſault, ſtrike *at* another and miſs him, this is an aſſault: ſo if he hold up his hand againſt another in a threatening manner and ſay nothing, it is an aſſault.—In the principal caſe the plaintiff had judgment.

9 Bac. Ab. 154. Gilb. Law of Evid. 256. 1. Com. Dig. 591. Bull. N. P. 15. 1. Hawk. P. C. 263.

Medlicot

* Medlicot *againſt* Joyner.

Caſe 14.

EJECTMENT. The plaintiff at the trial offered in evidence *a copy* of a deed that was burnt by the fire. The copy was taken by one *Mr. Gardner* of the *Temple*; who ſaid, he did not examine it by the *original*, but that he writ it, and that it always lay by him as *a true copy*.—THE COURT agreed to have it read, the original deed being proved to be burnt.

When *a deed* is proved to be burnt, *a copy* of it is good evidence, though not examined with *the original*, if underſtood to be *a true copy*.—S. C. 2. Keb. 546. Poſt. 94. 114. 266. 3. Keb. 477. 5. Mod. 211. 386. 6. Mod. 285. 248. 10. Co. 92. 2. Vern. 471. 591. 603. Abr. Eq. 228. 1. Stra. 401. 526. See alſo 1. Atkins, 49. 3. Atkins. 214. Salk. 285. Bull. N. P. 228. 254. Gilbert's Law of Evidence, 97, 98. Dougl. 594. 3. Term Rep. 151. 3. Com. Dig. "Evidence" (B 4.). Ambler's Rep. 248. where it is ſaid, that this was the firſt caſe where parole evidence was admitted of the contents of a deed.

Anonymous.

Caſe 15.

TWISDEN, *Juſtice*. If a feoffee upon condition be diſſeiſed, and a fine be levied, and five years paſs, and then the condition be broken, the feoffor may enter; for the *diſſeiſor* held the eſtate ſubject to the condition; and ſo did the *conuſee*, for he cannot be in of a better eſtate than the *conuſor* himſelf was.

If a feoffee upon condition be diſſeiſed, the feoffor may enter on condition broken, although a fine and non-claim have intervened.—Poſt. 217. Owen, 141. Co. Lit. 240. b. 1. Co. 124. 9. Co. 106. 10. Co. 98. Cro. Eliz. 919. Cro. Car. 577. Com. Rep. 547. Ld. Ray. 750. 782. Stra. 1128. 1. Atk. 631. 1. Peere Wms. 270. 520. 3. Peere Wms. 288. 368. See the Hargrave edition of Co. Lit. 239. note (1), and 332, note (1). Cowp. 701.

Daw *againſt* Swayne.

Caſe 16.

AN ACTION UPON THE CASE was brought againſt one for ſuing the plaintiff *in placito debiti* for ſix hundred pounds, and falſly and maliciouſly affirming to the bailiff of *Weſtminſter* that he did owe him ſix hundred pounds, whereby the bailiff inſiſted upon *extraordinary bail*, to his damages, &c. The defendant traverſes, ABSQUE HOC, that he did falſly and maliciouſly affirm to the bailiff of *Weſtminſter* that he did owe him ſo much.—WINNINGTON moved in arreſt of judgment, that the action would not lie; but the plaintiff had judgment.

An action on *the caſe* lies for falſely and maliciouſly holding another to ſpecial bail.
S.C. 1. Sid. 424. S.C. 1. Lev. 275. S.C. 2. Keb. 546. Raym. 176. 1. Vent. 18. 1. Saund. 228. 1. Lev. 292. 3. Lev. 211. Hob. 267. 1 Salk. 14. 8. Mod. 227. 12. Mod. 208. 257. 273. 555. Fitzg. 43. 98. 10. Mod. 145. 149. 209. 217. Ld. Ray. 380. 503. Dougl. 158. 215. 359. 1. Ter. Rep. 535. 2. Ter. Rep. 225. 3. Term Rep. 51. 183.

KELYNGE, *Chief Juſtice*. If there had been no cauſe of action, an action upon the caſe would not lie, becauſe he has a recompence by law; but here was a cauſe of action. If one ſhould arreſt you in an action of two thouſand pounds to the intent that you ſhould not find bail, and keep you from practice all this Term, and this is found to be falſly and maliciouſly, ſhall not you have an action for this?—TWISDEN, *Juſtice*, ſaid, that he knew this to have been SERJEANT ROLL's opinion.

MORETON, *Juſtice*. *Foxley*'s *Caſe* (*a*) is, that if a man be outlawed in another county where he is not known, an action upon the caſe will lie: ſo an action lies againſt the ſheriff, if reaſonable bail be offered and refuſed.

(*a*) 1. Roll. 103.

Caſe 17.

* Anonymous.

Bail and declaration. S. C. 2. Show. 281.

TWISDEN, *Juſtice*. If *three men* bring an action, and the defendant put in bail at the ſuit of *four men*, they cannot declare; but if he had put in bail at the ſuit of *one man*, that *one* might declare againſt him.

Caſe 18.

Smith and Another *againſt* Iriſh.

If the plaintiff die between the *day of niſi prius* and the *day in bank*, the action ſhall abate.—*Sed quære.* *Vide* Burnet *v.* Holden, poſt. 6. S.C. 2. Keb. 548. Cro. Car. 509. 1. Leon. 263. 1. Keb. 477.

JUDGMENT was entered as of *Trinity Term* for the queen mother, and a writ of enquiry of damages was taken out returnable this Term, and ſhe died in the vacation time.—RESOLVED, that the firſt was but an interlocutory judgment, and that the action was *abated* by her death.—TWISDEN, *Juſtice*. Some have queſtioned how you ſhall come to make the death of the party appear between *the verdict* and the *day in bank*; and I have known it offered by *affidavit*; by *ſuggeſtion* upon the roll; and by *motion*.

2. Keb. 584. 449. 477. 1, Vent. 235. 1. Sid. 131. 6. Mod. 142. 1. Mod. 6. 3. Keb. 160. 466. 4. Co. 39. Hob. 129. Strange, 47. 1. Com. Dig. 56.

By 17. Car. 2. c. 8. in all actions the death of either party between the verdict and the judgment ſhall not be alledged for *error*, ſo as ſuch judgment be entered within two Terms after ſuch verdict. See 1. Lev. 277. 1. Salk. 8. 2. Keb. 800. 2. Vern. 220.—And by 8. & 9. Will. 3. c. 11. ſ. 6. in all actions commenced in any court of record, if either plaintiff or defendant die after an interlocutory judgment, and before a final judgment obtained, and the action be ſuch as might be originally maintained by or againſt the executors or adminiſtrators of ſuch plaintiff or defendant, it ſhall not *abate* by reaſon of ſuch death. See 3. Term Rep. 437.

Caſe 19.

The Caſe of Troy, an Attorney.

An information for extortion will lie on the 3. *Jac.* 1. c. 7. againſt an attorney.

AN INFORMATION of extortion againſt TROY, *an attorney*.—It was moved in arreſt of judgment, that attornies are not within any of the ſtatutes againſt extortion; and therefore the information concluded ill, the concluſion being, *contra formam ſtatuti*.—TWISDEN, *Juſtice*. The ſtatute of 3. *Jac.* 1. c. 7. is expreſs againſt attornies.—KELYNGE, *Chief Juſtice*. I think, as thus adviſed, that attornies are within all the ſtatutes of extortion.

Co. Lit. 368, b. 2. Inſt. 209. 3. Inſt. 149. 4. Inſt. 274. 1. Hawk. P. C. 172. 317. 1. Salk. 86. See alſo 2. Geo. 2. c. 22. ſ. 23. Stra. 633.

A penal information againſt an attorney for extortion, in a cauſe which he was employed to proſecute, muſt expreſsly alledge in what *court* the defendant was impleaded.

It was afterwards moved in arreſt of judgment, FIRST, that the information was inſufficient in the law; becauſe SIR THOMAS FANSHAW informed, that *Mr. Troy*, being an attorney of the court of common pleas, did, at *Maidſtone*, cauſe one *Collop* to be impleaded for 9s. 4d. debt, at the ſuit of one *Dudley Sillinger*, *&c.*; and this was *ad grave damnum* of *Collop*, *&c.*; but it is not expreſſed in what court he cauſed him to be impleaded.

S. C. 1. Sid. 434. S. C. 2. Keb. 548. 1. Jones, 65. Noy, 76. 2. Roll. Ab. 32. 75. 266. 1. Roll. Ab. 16. 1. Roll. Rep. 323. Ray. 315. 8. Mod. 109. 338. 10. Mod. 41, 45. 263.

SECONDLY,

SECONDLY, That which the defendant is charged with is not an offence; for he ſaith, that he did cauſe him to be impleaded, and received the money the ſame day; and perhaps he received the money after he had cauſed him to be impleaded. THE CASE OF TROY, AN ATTORNEY.

THIRDLY, Then it is not ſufficiently alledged, that he did *illicitè* receive ſo much; and extortion ought to be particularly alledged. *Extortion* muſt be ſpecially alledged, Raym. 245.

FOURTHLY, There is not any ſtatute that an attorney ſhall receive no more than his juſt fees. The profeſſion of an attorney is at common law, and allowed by the ſtatute of *Weſtminſter* 1. c. 26.; and the * ſtatute of 3. *Jac.* 1. c. 7. does not extend to this matter. *Non conſtat* in this caſe, if what he received was for fees or no. *[6]

FIFTHLY, The ſuit for an offence againſt the ſtatutes muſt be brought by *the party*, not by *Sir Thomas Fanſhaw*.

KELYNGE, *Chief Juſtice*. If the party grieved will not ſue for the penalty of treble damages given by that ſtatute, yet the king may proſecute to turn him out of THE ROLL. Cowp. 829.

TWISDEN, *Juſtice*. I doubt that; nor is it clear, whether an information will lie at all upon that ſtatute, or not; for the ſtatute does not ſpeak of an information.

KELYNGE, *Chief Juſtice*. Whenever a ſtatute makes a thing criminal, an information will lie upon that ſtatute, though not given by expreſs words. 2. Hawk. P. C. 302. *notis*. 1. Burr. Rep. 545. 799. 2. Burr. 805. 834. Cowp. 524. 650.

TWISDEN, *Juſtice*. It appears here, that this money was not received of his client, for he was againſt *Collop*; but he ought to ſhew in what court the impleading was; for otherwiſe it might be before The Mayor in his chamber. To which THE COURT agreed: ſo the information was quaſhed. 10. Co. 75. b. 1. Salk. 374. Dougl. 153.

Burnet *againſt* Holden, Executor of Greenhill. Caſe 20.

THERE were two points in this caſe. FIRST, If the defendant die after the day of *niſi prius*, and before the day *in bank*, Whether the judgment ſhall be ſaid to be given in the life of the defendant? If a defendant die between the *verdict* and the *day in bank*, leaving a creditor his executor, ſuch executor cannot ſet off his debt in a *ſcire facias* on the judgment. S. C. 2. Keb. 40. 559. 592. 783. 800. S. C. 1. Lev. 277.

SECONDLY, Admitting that it ſhall, yet, Whether the executor ſhall have the advantage taken from him of *retaining* to ſatisfy his own debt?

TO THE FIRST it was ſaid, that the act of parliament 17. *Car.* 2. c. 8. only takes away a *writ of error* in ſuch caſe; but there is no *day in bank* to plead (*a*).—It was ordered to ſtand in the paper; and, after argument, it was adjudged for the plaintiff.

S. C. Ray. 210. Ante, 5. 8. Salk. 8. 6. Mod. 142. 1. Vent. 235. 2. Term Rep. 389. 3. Term Rep. 557.

(*a*) See the ſtatute of 8. & 9. Will. 3. c. 11. ſ. 6. ante, page 6. caſe 18. in *notis*; by which the death of either of the parties between the interlocutory and final judgment ſhall not *abate* the ſuit, or be alledged for *error*.

Caſe 21.

Meller *againſt* Staples.

Eaſter Term, 21. Car. 2. Roll

A preſcription by a corporation for common *ſans nombre in groſs* is good upon demurrer, without ſaying *levant* and *couchant*.
S.C.2.Lev.246.
S.C.2. Jo. 115.

THE corporation of the town of *Derby* preſcribe to have common without number *in groſs*.

SAUNDERS. I conceive it may be by preſcription. What a man may *grant* may be *preſcribed* for; *Co. Lit.* 123. is expreſs.

KELYNGE, *Chief Juſtice*. In a foreſt the king may grant common for ſheep, but you cannot preſcribe for it; and if you may preſcribe for common without number *in groſs*, then you may drive all the cattle in a fair to the common.

* [7]

* SAUNDERS. But the preſcription is for their own cattle only.

S. C. 1. Saund. 343.
S. C. 2. Keb. 527. 550. 570.
S.C.2.Show.43.
Poſt. 75.
Stiles, 428.
1. Lev. 196.
2. Lev. 2.
1. Sid. 313.
2. Sid. 87.
Lutw. 431. 500.

TWISDEN, *Juſtice*. If you preſcribe for common without number appurtenant to the land, you can put in no more cattle than what is proportionate to your land; for the law ſtints you in that caſe to a reaſonable number (*a*). But if you preſcribe for common without number *in groſs*, what is it that ſets any bounds in that caſe? There was a caſe in GLYNN's time of *Maſſelden v. Stoneby*, where *Maſſelden* preſcribed for common without number without ſaying *levant et couchant*; and that being after *a verdict*, was held good; but if it had been upon *a demurrer*, it would have been otherwiſe.—LIVESAY ſaid he was agent for him in the caſe.

2. Show. 30. 95. 1. Vent. 163. 383. 10. Mod. 53. 72. 12. Mod. 249. 1. Ld. Ray. 406. 558. 726. 2. Ld. Ray. 1188. 1230. 3. Bl. Com. 239.—(*a*) See Hobſon *v.* Todd, 4. Term Rep. 71.

Caſe 22.

Bucknall *againſt* Swinnock.

To an *aſſumpſit* for money had and received, a plea that the plaintiff agreed that the defendant ſhould pay it to a third perſon is bad.—S. C. 2. Keb. 550. Poſt 69.—(*b*) NOTE, Judgment was given for the plaintiff. See S. C. 2. Keb. 550.—See alſo 1. Salk 394.

INDEBITATUS ASSUMPSIT for money received to the plaintiff's uſe. The defendant pleads ſpecially, that *poſt aſſumptionem prædict*, there was an agreement between the plaintiff and defendant, that the defendant ſhould pay the money to *J. S.* and he did pay it accordingly. The plaintiff demurs.—JONES. This plea doth not only amount to the *general iſſue*, but is *repugnant* in itſelf.—It was put off to be argued (*b*).

Caſe 23.

Hall *againſt* Wombell.

Debt will not lie on a judgment given by commiſſioners of exciſe.—Raym. 34. Jones, 29. Winch. 61. Godb. 354. 1. Roll. Abr. 599. Cro. Eliz. 386. 1. Wilſ. 316. 1. Eſpinaſſe's Digeſt, 213.

THE queſtion was, Whether an action of DEBT would lie upon a judgment given by the commiſſioners of exciſe, upon an information before them?—*Adjournatur*.

Caſe 24.

Vaughan *againſt* Caſewell.

In a *quod ei deforceat* for lands in *Merioneth*, the tenant cannot vouch a vouchee in *Cornwall*; for being an *Engliſh county* the voucher cannot be had; and a demurrer to *a plea* to ſuch illegal voucher, is, if adjourned, *peremptory* on the tenant.—S. C. 2. Saund. 38. S. C. 2 Keb. 553. 567. 574. 603. 618. 8. Co. 50. 2. Inſt. 341. 367. 411. Cro. Car. 445.

A WRIT OF ERROR was brought to reverſe a judgment given at the grand ſeſſions in *Wales*, in a writ of *quod ei deforceat*.

SAUNDERS. The point in law will be this, Whether a tenant's vouching a vouchee out of the line be peremptory and final, or that a *reſpondeas ouſter* ſhall be awarded (*a*)?

VAUGHAN *againſt* CASEWELL.

* MR. JONES. In an aſſiſe the tenant may vouch another named in the writ, as in the Year Book 9. *Hen.* 5. *pl.* 14.; and ſo alſo in *Plowden*, 89. *b.*; but a voucher cannot be of one not named in the writ (*b*), becauſe it is *feſtinum remedium*. In *Wales* they never allow *foreign vouchers*, becauſe they cannot bring them in. If there be a *counterplea* to a *voucher*, and that be adjudged in another Term, it is always peremptory; otherwiſe if it be determined the ſame Term (*c*).

* [8]

(*a*) See the Year Books, 20. Aſſ. pl. 2. 11. Hen. 4. pl. 23. 26. Hen. 6. pl. 40. 8. Hen. 7. pl. 7. 10. Hen. 8. pl. 22. and 2. Inſt. 243.

(*b*) This writ is given by the ſtatute of RUTLAND, 12. Edw. 1. which was not formerly in print, 2. Saund. 38.; but it is now inſerted in the appendix to Mr. Ruffhead's edition of the ſtatutes, vol. ix. page 3.

(*c*) The judgment given at the Grand Seſſion in favour of the *demandant* was, after the aſſignment of this and ſeven other errors, affirmed, See S. C. 2. Saund. 42.

Anonymous.

Caſe 25.

In an action againſt *huſband* and *wife*, if *the wife* be arreſted, ſhe ſhall be diſcharged on common bail.

AN ACTION of trover and converſion was brought againſt huſband and wife, and the wife arreſted.—TWISDEN, *Juſtice*. The wife muſt be diſcharged upon common bail. So it was done in *Lady Baltinglaſs's Caſe* (*d*). And where it is ſaid in CROKE, that the wife in ſuch caſe ſhall be diſcharged, it is to be underſtood that ſhe ſhall be diſcharged upon common bail.—So LIVESAY ſaid the courſe was.

S. C. 1. Vent. 49. Cro. Jac. 445. 1. Lev. 216. 6. Mod. 17. 1. Sid. 214. 10. Mod. 163. 12. Mod. 19. 89. 246. 444. 2. Stra. 1167. 1237. 1272. 2. Bar. 72. 80. Salk. 115. 3. Wilſ. 124. 2. Bl. Rep. 720. Tidd's Pract. 49.

(*d*) 1. Vent. 64.—And ſee the Caſe of Edwards *v.* Rourke and his wife, 1. Term Rep. 486. *in point*: but if the *coverture* be not clearly made out, the Court will not diſcharge a *feme covert* on *motion* in a ſummary way, Pearſon *v.* Mary Meadow, 2. Bl. Rep. 903. but will put the party to *plead* the *coverture*; which plea muſt be in *abatement*, and not in *bar*. Milner *v.* Milnes, 3. Ter. Rep. 627. See alſo Clerk *v.* Norris, H. Bl. Rep. C. B. 235. and 1. Wilſ. 265.

Anonymous.

Caſe 26.

Practice on an attachment of privilege. Ante, 2.

IT was ſaid to be the courſe of THE COURT, that if *an attorney* be ſued time enough to give him two rules to plead within the Term, judgment may be given, otherwiſe not.

Stra. 77. 8. Mod. 192. 12. Mod. 112. 163. 535. Barnes Notes, 33. See Tidd's Practice, 79. 3. Cromp. Pract. 120.

Ruſſell *againſt* Collins.

Caſe 27.

An *aſſumpſit* for "work and labour" generally, without ſtating the particulars, is good, Poſt. 46. 289. Mod. 296. 816

ASSUMPSIT was brought upon two *ſeveral* promiſes, and *entire* damages were given.—SYMPSON moved in arreſt of judgment, that for one of the promiſes an action will not lie. It was a general *indebitatus* for work and labour done, which was urged to be too general and uncertain.—By THE COURT. It is

after verdict. S. C. 1. Sid. 425. S. C. 1. Vent. 44. S. C. 2. Keb. 552. Hob. 5. Cro. Jac. 207. 12. Mod. 16. 250. 308. 324. Fitzg. 302. 10. Salk. 446. Stra. 127. 1. Com. Dig. 152.

urged

RUSSELL *againſt* COLLINS.

well enough, as *pro mercimoniis venditis et pro ſervitio*, without mentioning the goods or the ſervice in particular.—And the plaintiff had judgment.

* [9]

Caſe 28.

* Dyer *againſt* Eaſt.

A huſband is liable for *neceſſaries* ſold to his wife, except ſhe has *eloped*, and he has given *notice* not to truſt her.

POLLEXFEN moved for *a new trial* in an action upon the caſe, upon a promiſe for wares that the wife took up for wearing apparel.—KELYNGE, *Chief Juſtice*. The huſband muſt pay for the wife's apparel, unleſs ſhe elope, and he give notice not to truſt her: that is the Caſe of *Scott v. Manby* (*a*), which was a hard judgment; but we will not impeach it.—The plaintiff had judgment.

S. C. 2. Keb. 554. S. C. 1. Vent. 42. 146. S. C. 1. Sid. 425.—(*a*) See this caſe, and the Notes thereon, Poſt. 124. to 144.

Caſe 29.

Beckett *againſt* Taylor.

Arbitrators may award one of the parties to diſcharge the other from his undertaking to pay a debt to a third perſon.

DEBT upon a bond to ſubmit to an award. An exception was taken to the award, Becauſe the concurrence of a third perſon was awarded; which makes it void. They award, that one of the parties ſhall diſcharge the other from his undertaking to pay a debt to a third perſon; and it was pretended, that the third perſon, being no party to the ſubmiſſion, was not compellable to give a diſcharge. But it was anſwered, that he is compellable; for in caſe the debt be paid him, he is compellable in equity to give a releaſe to him that had undertaken to pay it; and the Caſe of *Giles v. Southward* (*b*) and 1. *Roll. Abr.* 248. were cited.—Judgment *niſi*.

S. C. 2. Keb. 546. 554. Cro. Car. 541. 10. Mod. 200. 204. Ld. Ray. 123 246. 898. 964. Com. Rep. 114. 183. 328. 547. 12. Mod. 8. 116. 130. 424. 587. Fitzg. 168. 270. 2. Bar. K. B. 291. See a Treatiſe on the Law of Awards, by S. KYRE eſq. page 103. to 107. where all the Caſes upon this point are collected; and the 4. & 5. Ann. c.

(*b*) Stiles, 385.

Caſe 30.

Memorandum.

On the creation of a *Serjeant at Law* the rings given to the Chief Juſtices and the Chief Baron muſt weigh *twenty ſhillings*.

SEVENTEEN Serjeants being made the 14th day of *November*, a day or two after SERJEANT POWIS, the junior of them all, coming to the king's bench bar, LORD CHIEF JUSTICE KELYNGE told him, that he had ſomething to ſay to him, *viz.* that THE RINGS which he and the reſt of the Serjeants had given weighed but *eighteen ſhillings* a-piece; whereas FORTESCUE, in his book *De Laudibus Legum Angliæ*, ſays, "The rings given "to THE CHIEF JUSTICES and to THE CHIEF BARON ought to "weigh *twenty ſhillings* a-piece;" and that he ſpoke not this expecting a recompence, but that it might not be drawn into a precedent, and that the young gentlemen there might take notice of it.

S. C. 2. Keb. 552. S. C. Ray. 192.

* [10]

Caſe 31.

* Clerke *againſt* Rowell and Phillips.

A verdict in one ejectment cannot be given in evidence on the trial of another.

A TRIAL AT BAR in an *Ejectment* for lands ſettled by *Sir Peter Brookhurſt*—THE COURT ſaid, that a trial againſt others ſhall not be given in evidence in this cauſe.

—See 3. Mod. 141. 5. Mod. 386. 10. Mod. 292. 12. Mod. 319. 339. Stra. 1151. Ld. Raym. 1292. Bull. N. P. 232. and Gilbert's Law of Evid. Loft's Edit. 35.

TWISDEN, *Juſtice*, ſaid, that an entry to deliver a declaration in ejectment ſhould not work to avoid a fine, but that it muſt be *an actual entry*. Upon which laſt matter the plaintiff was non-ſuited.

An entry in ejectment to deliver declaration is not ſufficient to avoid *a fine*; for it

muſt, for this purpoſe, be an *actual entry*.—S. C. 1. Vent. 42. S. C. 1. Saund. 319. S. C. 2. Keb. 555. S. P. 1. Vent. 332. S. P. 2. Stra. 1086.—See alſo Vent. 248. 10. Mod. 124. 12. Mod. 113. Ante, 125. 2. Stra. 1128. Ld. Ray. 750. 3. Keb. 218. 2. Burr. 1897. Runnington's Eject. 79. Dougl. 460. 483. and note (1), 485, 486.

Redman's Caſe. Caſe 32.

BALDWIN, *Serjeant*, moved, that one *Redman*, an attorney of the court, who was going into *Ireland*, might put in *ſpecial bail*.—TWISDEN, *Juſtice*. A clerk of the court cannot put in bail. You have filed *a bill* againſt him, and ſo waived his putting in bail.—KELYNGE, *Chief Juſtice*. You may remember *Wolly's Caſe* (*a*); but we diſcharged him by reaſon of his privilege, and took common bail.—TWISDEN, *Juſtice*. You cannot declare againſt him *in cuſtodiâ*. But although we cannot take *bail*, yet we may commit him, and then deliver him out by *mainpernancy*.—JONES. If he be in court *in propriâ perſonâ*, you cannot proceed againſt his bail.—THE COURT agreed, that the attorney ſhould not put in bail.

An *attorney* ſued *by bill* cannot be arreſted; and therefore, although he be about to leave the kingdom, the Court will not oblige him to find *ſpecial bail*.

S. C. 2. Keb. 555. 12. Mod. 112. 163. 535. 2. Stra. 864. 964. Ld. Ray. 156. 2. Cromp. 113. Tidd's Practice, 50. 76. 306. 2. Bl. Rep. 1085. And ſee the Caſe of Comerford v. Price, Dougl. 312. 1. Wilſ. 292. and note (85). p. 314.—(*a*) 3. Keb. 526.

Grafton's Caſe. Caſe 33.

GRAFTON, one of the Company of Drapers, was brought into court by *habeas corpus*. In the return the cauſe of his impriſonment was alledged to be, for that being choſen of *the livery* he refuſed to ſerve.

The City of *London* may *fine* a freeman for not taking-up his *livery*, and recover it by action of debt.

THE COURT. They might have fined him, and have brought an action of *debt* for the ſum; but they cannot impriſon him.

KELYNGE, *Chief Juſtice*. The court of aldermen may impriſon a man who ſhall refuſe to accept the office of alderman, becauſe they are a court of record, or they may want aldermen elſe.—So he was releaſed.

S. C. 2. Keb. 955. S. C. March. 179. 1. Sid. 288. 6. Mod. 132. 8. Mod. 132. 12. Mod. 269. 665. Comyns, 22. Ld. Ray. 1566. 1. Term Rep. 118.

* [11]

* Anonymous. Caſe 34.

IT was moved for *the plaintiff*, that a perſon named in the *ſimul cum* being a material witneſs might be ſtruck out; and it was granted.—KELYNGE, *Chief Juſtice*, ſaid, that if nothing was proved againſt him, he might be a witneſs for the defendant.

In an action for *a tort* againſt ſeveral, thoſe againſt whom there is no proof may be acquitted, and give evidence for the defendant.—1. Sid. 441. Bull. N. P. 285, 286. Strange, 633. 1104. Annally's Rep. 123. 133. 162. 264.

Clerke,

Caſe 35. Clerke, on the Demiſe of Prin, *againſt* Heath.

A deed under ſeal, when properly proved, may be read in evidence, though the ſeal be broken off.

S. C. 2. Keb. 556. S. C. 1. Vent. 14.

EJECTMENT. The plaintiff claimed by a leaſe from *Thomas Prin*, clerk. It was objected, that *Prin* had not taken the oath according to the late act of uniformity, 12. *Car.* 2. c. 17. ſ. 27. whereupon he produced a certificate of the biſhop that had only a ſmall bit of wax upon it.—TWISDEN, *Juſtice*. If it was ſealed, though the ſeal be broken off, yet it may be read; as we read recoveries after the ſeal is broken off; and I have ſeen letters of adminiſtration given in evidence after the ſeal broken off; and ſo of wills and deeds. Accordingly it was read.

S. C. 1, Sid. 426. 2. Show. 28. 2. Lev. 220. Palm. 403. 8. Mod. 278. 8. Bulſt. 79. 5. Co. 23. Cro. Eliz. 110. 11. Co. 28. 2. Lev. 220. March, 199. 1. Strange, 512. Ld. Ray. 1536. and ſee Gilbert's Law of Evidence, Loffi's Edition, p. 111. to 114. Bull. N. P. 267.

What ſhall be evidence of epiſcopal ordination.

Poſt. 90. Ld. Ray. 893, 1206.

(*a*) See 1. *Eliz.* c. 2. and 13. *Eliz.* c. 12. ſ. 3.

SECONDLY, It was objected, that the church is *ipſo facto* void by the act of uniformity, 12. *Car.* 2. c. 17. if the incumbent had no epiſcopal ordination. So they ſhewed that *Prin* was ordained by a biſhop. It was likewiſe proved, that he had declared his aſſent and conſent to the common prayer (*a*) in due time, before *St. Bartholomew's* day.

The 12. *Car.* 2. c. 17. does not extend to livings without cure of ſouls.

THIRDLY, It was then urged, that the ſtatute of 12. *Car.* 2. c. 17. does not confirm the plaintiff's leſſor in this living, for that it is not a living with cure of ſouls; for it has a vicarage endowed.—TWISDEN, *Juſtice*. If it be a living without cure, the act does not extend to it.

* [12]

Whoever is admitted, inſtituted, and inducted, into any eccleſiaſtical benefice, ſhall, *ipſo facto*, have the cure of ſouls; and therefore a *perſon* and *vicar* may have a concurrent cure in the ſame church; for it may have two patrons, each having an undivided moiety.

S. C. 2. Keb. 556. S. C. 1. Vent. 14.

* MR. SOLICITOR. The preſentation does not mention cure of ſouls.—(So they read a preſentation of *a rector*, and another of *a vicar*, in neither of which any mention was made of cure of ſouls, but *the vicar*'s was *reſidendo*.) If both be preſentative, the cure ſhall be intended to be in *the vicar*.—KELYNGE, *Chief Juſtice*. Why may not both have the cure?—MR. SOLICITOR. If *the vicar* be endowed, *the rector* is diſcharged of reſidence by act of parliament of 21. *Hen.* 8. c. 13. ſ. 28.

TWISDEN, *Juſtice*. Synodals and procurations are duties due to the ordinary, which vicars, when the parſonages are impropriated, always pay. But I queſtion whether they who come into a church by preſentation to, and inſtitution by, the biſhop, have not always the cure of ſouls. It is true, in *donatives*, where the miniſter does not come in by the biſhop's inſtitution, there is no cure; but they who come in by inſtitution of the biſhop have their power delegated to them from him, and generally have cure of ſouls.

S. C. 1. Sid. 426. 2. Co. 44. Fitzg. 107. 309. 8. Mod. 183. 367. 10. Mod. 64. 385. 12. Mod. 3. 232. 1. Ld. Ray. 7. 865. 2. Ld. Ray. 856. 1205. 1507. 2. Stra. 715. 776. 942. 2. Peere Wms. 326. Gilb. Eq. Rep. 178. 180. 2. Burn's Eccleſ. Law, 347. 1. Black. Com. 386. 3. Wilſ. 365.

MR.

CLERKE, on the Demise of PRIN, *againſt* HEATH.

MR. SOLICITOR. There are ſeveral *rectories* without cure.—TWISDEN, *Juſtice*. When came *rectories* in?—MORETON, *Juſtice*. After the Council of *Lateran*; and *vicars* came in in the ſeventeenth year of KING JOHN. Before the Council of *Lateran* the biſhop preſented *teachers*, and received the tithes himſelf; but ſince that time he hath appointed others to the charge, and ſaith, *Accipe curam tuam et meam.*—KELYNGE and TWISDEN, *Juſtices*. It is ſaid ſo by LORD COKE, but not done.

TWISDEN, *Juſtice*. Wherever there is a cure of ſouls, the church is viſitable, either by the biſhop, if it belong to him; if to a layman, he muſt make delegates; if to the king, my lord keeper does it; and where a man comes in by preſentation, he is *primâ facie* viſitable by the biſhop.

KELYNGE, *Chief Juſtice*. I take it, that whoever comes in under a biſhop's inſtitution hath the cure.

TWISDEN, *Juſtice*. The Caſe of *Grendon* (*a*) ſays expreſsly, that the biſhop hath the cure of ſouls of all the dioceſe, and doth by inſtitution transfer it to the parſon; ſo that *primâ facie* he who is inſtituted hath the cure. The *vicarage* is derived out of the *parſonage*; and if the vicar come to poverty, the parſon is bound to maintain him. There is an appropriation to a corporation; but the corporation cannot have the cure of ſouls, being a body politic; but when they appoint a vicar, he, coming under the biſhop by inſtitution, hath cure of ſouls; and *a donative*, when it comes to be *preſentative*, hath the cure of ſouls.—KELYNGE, *Chief Juſtice*, agreed.

(*a*) Grendon v. Biſhop of Lincoln, Plowd. 495. Bendl. 293. 1. Term Rep. 379. 403.

TWISDEN, *Juſtice*. We hold, that when a rector comes in by inſtitution, the biſhop hath power to viſit him for his doctrine and his life; for he hath the particular cure, but the biſhop the general; and that the biſhop hath power to deprive him.

See Maddox Caſe, 2. Keb. 578. that the biſhop is in this caſe *explorator vitiorum*.

Abbot *againſt* Moore. Caſe 36.

A promiſe by the *grantor* of a rent charge to pay it to a *third perſon*, in conſideration of a debt due to him from the *grantee*, will not maintain an *aſſumpſit*.

THE plaintiff declares, that whereas one *William Moore* was indebted to him two hundred and ten pounds, and whereas the ſaid *William Moore* had an ANNUITY out of the defendant's lands, that the defendant, in conſideration that the plaintiff had agreed that the defendant ſhould pay ſo much money to the plaintiff, the defendant did promiſe to pay it. * After a verdict it was objected, in arreſt of judgment, that here was not any conſideration. —And THE COURT was of that opinion.

aſſumpſit.—S. C. 2. Keb. 543. 557. Poſt. 43. 10. Mod. 294. 331. 1. Ld. Raym. 358. 368. 2. Stra. 94. 592. 2. Stra. 933. 1027. 2. Term Rep. 80.

* [13]

An action cannot be *diſcontinued* after verdict.

THE PLAINTIFF would then have diſcontinued the action, but THE COURT would not ſuffer that after a verdict.

dict.—Poſt. 41. 1. Saund. 210. Cro. Eliz. 575. 1. Roll. Abr. 27. pl. 50. 29. pl. 60. See 1. Lev. 48. 1. Sid. 60. 2. Danv. 156. N. Lutw. 91.

The

Case 37.

The Conſtable of Homeby's Caſe.

The juſtices of the peace may elect conſtables of particular pariſhes, although no conſtables had before been choſen for ſuch pariſh, provided there be no leet for ſuch purpoſe. S. C. 2. Keb. 557. S. C. 1. Bac. Abr. 440. Poſt. 78. 1. Salk. 175. 381. 5. Mod. 96. 129. 6. Mod. 96. 2. Saund. 290. 2. Show. 75. 2. Stra. 1050. 8. Mod. 215. 227. 12. Mod. 88. 215. 180. 256. Fitzg. 292. Ld. Ray. 169. Cowp. 613.

THURLAND moved to quaſh an order made by the juſtices of the peace for one to ſerve as conſtable in *Homeby*.

MORETON, *Juſtice*. If a leet neglect to chuſe a conſtable, the juſtices of peace, upon complaint made to them, ſhall, by the ſtatute 13. & 14. *Car.* 2. c. 12. ſ. 15. appoint a conſtable.

TWISDEN, *Juſtice*. In this caſe there are affidavits that there never was any conſtable there; and I cannot tell, whether or no the juſtices of peace can erect a conſtablewick where never any was before. If he will not be ſworn, let them *indict* him for not executing the office, and let him traverſe, that there never was any ſuch office there.—KELYNGE, *Chief Juſtice*. Go and be ſworn; or if the juſtices of the peace commit you, bring your action of falſe impriſonment.

TWISDEN, *Juſtice*. If there be a court-leet that hath the choice of a petty conſtable, the juſtices of peace cannot chuſe there; and if it be in the hundred, I doubt whether the juſtices of the peace can make more conſtables than were before. High conſtables were not *ab origine*, but came in with juſtices of the peace, in the tenth year of *Henry* 4.

KELYNGE and MORETON *contra*.—MORETON, *Juſtice*. The book of *Villarum* in THE EXCHEQUER ſets out all the vills; and there cannot be a conſtablewick created at this day.—THE COURT in this caſe ordered him to be ſworn.

The ſervants of members of parliament are exempted from being conſtables.—Cro. Car. 389. 2. Keb. 477. 578. 1. Lev. 265. Poſt. 22. Dougl. 538. 686.; and ſee 2. Hawk. P. C. 99. to 102. 4. Com. Dig. "Leet" (M 7.).

THURLAND. If they chuſe a parliament-man's ſervant conſtable, they cannot ſwear him.—TWISDEN, *Juſtice*. I do not think the privilege extends to the tenant of a parliament-man, but to his ſervant.

Case 38.

The King *againſt* Bliſſet and Wincott.

To meet tumultuouſly at *conventicles* is a breach of the peace. S. C. 2. Keb. 558. 8. Mod. 45. 114. 2. Show. 234. 238. 241. 2. Vent. 369. 6. Mod. 141. 11. Mod. 116. 1. Hawk. P. C. 296.; and the ſtatute of 22. Car. 2. c. 1. and the Toleration Act, 1. Will. & Mary, c. 18.

TWO perſons committed for being at *a conventicle*, were brought up by *habeas corpus*.—TWISDEN *Juſtice*. To meet in conventicles in ſuch numbers as may be affrighting to the people, and in ſuch numbers as the conſtable cannot ſuppreſs, is a breach of the peace, and of a perſon's recognizance for the good behaviour.—NOTE, This was after the late act, 16. *Car.* 2. c. 4. againſt *conventicles* expired.

Case 39.

* Lee *againſt* Edwards.

The want of an averment helped after verdict. S. C. 1. Vent. 44. S. C. 1. Sid. 428. S. C. 2. Keb. 559. 566. S. C. 1. Lev. 280. Poſt. 285. Fitzg. 174. 275. 8. Mod. 2. 10. Mod. 229. 300. 12. Mod. 102. 105. 242. 306. 421. 434. 510. 565. 1. Ld. Ray. 284. 669. 1. Ld. Ray. 810. 1061. 1521. 1. Stra. 79. 1. Stra. 1011. Cowp. 826.; and ſee 5. Com. Dig. "Pleader" (C 61.).

AN ACTION ON THE CASE was brought upon two promiſes.—FIRST, In conſideration the plaintiff would beſtow his labour and pains about the defendant's daughter,

and

and would cure her, he did promiſe to pay ſo much for his labour and pains, and would alſo pay for the medicaments.—SECONDLY, That in conſideration he had cured her, he did promiſe to pay, &c. Lee *againſt* Edwards.

RAYMOND moved in arreſt of judgment, that he did not *avet* that he had cured her, the conſideration of the firſt promiſe being future, and both promiſes found, and entire damages given.

TWISDEN, *Juſtice.* It is well enough; for now it lies upon the whole record whether he hath cured her or no. If it had reſted upon the firſt promiſe, it had been naught; but in the ſecond promiſe there is an averment, that he had cured her; ſo that now after verdict it is helped, and the want of an averment is holpen in many caſes. Judgment *niſi*, &c.

Anonymous. Caſe 40.

TWISDEN, *Juſtice.* If a man be in priſon, and the marſhal die, and the priſoner eſcape, there is no remedy but to take him again. Eſcape on death of the marſhal.

3. Co. 72. Hob. 202.

1. Sid. 330. 2. Mod. 136. Strange, 423. and 8. & 9. Will. 3. c. 27. and 1. Ann. c. 6. 2. Term Rep. 126. 3. Term Rep. 583.

Anonymous. Caſe 41.

TWISDEN, *Juſtice.* Pleas in abatement come too late after imparlance. Pleading.

Cro. Car. 9. 2. Stra. 1120.

1. Vent. 236. Latch. 83. Dyer, 210. in marg. 2. Roll. 294. Carth. 26. 1. Com. Dig. 5. Jennings *v.* Ward, 1. Term Rep. 278. 3. Term Rep. 642.

Hall *againſt* Seabright. Caſe 42.

TRESPASS; wherein the plaintiff declared, that the defendant, on the twenty-fourth day of *January*, entered and took poſſeſſion of his houſe, and kept him out of poſſeſſion to the day of the exhibiting the bill. The defendant pleaded, that *ante prædictus tempus quo*, SCILICET, &c. the plaintiff did licenſe him (the defendant) to enjoy the houſe until ſuch a day. To treſpaſs, the defendant may plead *a licence* to enjoy the premiſes from ſuch a day to ſuch a day.

SAUNDERS. The plea is naught in ſubſtance; for a licence to enjoy from ſuch a time to ſuch a time is *a leaſe*; and ought to be pleaded as *a leaſe* and not as *a licence*; it is a certain preſent intereſt. S. C. 2. Keb. 534. 561. 591. S. C. 1. Sid. 428.

Hob. 35. Moor, 861. 8. Mod. 42. 12. Mod. 610. Win. Ent. 1099. Cart. 218. Cro. Eliz. 876. 1. Ld. Ray. 403. 2. Term Rep. 24. 166.

TWISDEN, *Juſtice.* It is true *, that in the Year Book of 5. *Hen.* 7. pl. 1. it is ſaid, that if one doth licenſe another to enjoy his houſe till ſuch a time, it is a leaſe; but whether it may not be pleaded as a licence, I have known it doubted.—Judgment *niſi*. *[15]

Coppin *againſt* Hernall. Caſe 43.

TWISDEN, *Juſtice*, ſaid, upon a motion in arreſt of judgment becauſe an award was not good, that the umpirage could not be made till the arbitrators time were out: and if any ſuch power An *umpirage* cannot be made until the arbitrators time

expired.—S. C. 2. Saund. 129. S. C. 1. Lev. 285. S. C. Ray. 187. S. C. 1. Sid. 428. 455. S. C. 2. Keb. 562. 619. Poſt. 276. 1. Roll. 261, 2. Vern. 100. 485. 1. Ld. Ray. 222.

COFFIN *against* HERNALL.

be given to the umpire; it is naught in its conſtitution; for two perſons cannot have a ſeveral juriſdiction at one and the ſame time.

But ſee the caſe of Roe *v.* Doe, 2. Term Rep. 645. where it is determined, that *arbitrators* who have the power of chuſing an *umpire*, may chuſe one the inſtant they begin to take the matters referred into conſideration.—See alſo Kyd's Law of Awards, 44. to 50. 117. &c. 2. Term Rep. 643. 3. Term Rep. 592. *in notis*.

Caſe 44.

Anonymous.

Panel.

THE law allows the defendant a copy of the panel, to provide himſelf for his challenges.

2. Hawk. P. C. ch. 43. and ſee 42. Edw. 3. c. 11. and 7. & 8. Will. 3. c. 3. 2. Hawk. 577. and 4. State Trials, 101. to 104.

Caſe 45.

Fettyplace's Caſe.

The miſpriſion of "*affeerere*" for "*afferre*," may be amended if right on the roll.

ACTION ON THE CASE upon a promiſe, in conſideration that the plaintiff would "*affeerere*" inſtead of "*afferre*," &c. It was moved in arreſt of judgment; and the caſe of *Bedel v. Sir Edward Wingfield (a)* was cited—TWISDEN, *Juſtice*. I remember "*diſtrictionem*" for "*diſtructionem*" cannot be helped; ſo neither "*vaccaria*" for "*vicaria*." So THE COURT gave directions to ſee if it was right on the roll.

5. Co. 45. a. 10. Mod. 88. Comyns, 60. 250. 376. 418. 2. Barnes, 12. 153. 287.—(*a*) Cro. Eliz. 466.

See alſo the 8. Hen. 6. c. 12. 1. Com. Dig. 317. Dougl. 114. 135. 1. Term Rep. 783. 2. Term Rep. 762. and the Caſe of Rex *v.* Beech, Dougl. 194. note (25). Cowp. 229. where it is ſaid, that the true diſtinction ſeems to be, that "where the omiſſion or addition of a letter does not change the word, ſo as to make it another word, the variance is not material.

Caſe 46.

Holloway's Caſe.

Trinity Term, 21. Car. 2. Roll 1844.

Eſtoppel.

THE condition of a bond for performance of covenants in an indenture doth *eſtop* to ſay there is no ſuch *indenture*, but doth not eſtop to ſay there are no *covenants*.

S. C. 1. Freem. 107. S. C. 1. Saund. 316. S. C. 2. Keb. 564. 3. Lev. 3. 45. Raym. 47. Moor, 420. Allen, 52. Cro. Jac 375. Co. Lit. 352. Cro. Eliz. 756. Stra. 610. 1. Roll. Abr. 872. 1. Term. Rep. 86. 701. 2. Term Rep. 171. 3. Term Rep. 365. 438. 441.

Caſe 47.

* Anonymous.

The *ancient form* of taking bail, and declaring in civil actions.

KELYNGE, *Chief Juſtice*. The courſe of the court is, that if a man be brought in upon a *latitat* for twenty or thirty pounds, we take the bail for no more; but yet he ſtands

—Ante, 11. Cro. Jac, 449. 6. Mod. 188. 2. Sid. 163. Comyn's, 75. 556. 10. Mod. 24. 153. 270. 280. 2. Stra. 922.

bail

bail for all actions at the ſame party's ſuit; otherwiſe if a ſtranger bring an action againſt him.—TWISDEN, *Juſtice.* They cannot declare till he hath put in bail; and when we take bail, it is but for the ſum in the *latitat*, perhaps thirty pounds, or forty pounds; but when he is once in, he may be declared againſt for two hundred pounds. ANONYMOUS.

But ſee rule Trinity Term 22. Car. 2. 6. Mod. 267. 1. Salk. 102. And it is now ſettled, that when the plaintiff declares for or recovers a greater ſum than is expreſſed in the proceſs upon which he declares, the bail ſhall not be diſcharged, but be liable for ſo much as is ſworn to and indorſed on the proceſs, or for any leſſer ſum which the plaintiff in ſuch action ſhall recover. Rule Eaſter Term 5. Geo. 2. Loffts 545.; and it is alſo determined, that the bail are liable to the coſts of the original action. Dougl. 330. 1. Term Rep. in C. B. 76.; and ſee Tidd's Practice, 131.

Smith *againſt* Wheeler. Caſe 48.

Eaſter Term, 20. Car. 2. Roll 570.

A WRIT OF ERROR was brought to reverſe a judgment in the common pleas, upon a ſpecial verdict in an ejectment.

A. being poſſeſſed of a term for eighty years conveys the whole term in part of the premiſes abſolutely, and the reſidue *in truſt* for himſelf for life, with remainder over; PROVIDED, that if he had iſſue *the truſts* ſhould ceaſe, and the aſſignment be *in truſt* for ſuch iſſue, with a power of revoking the ſaid truſt by his will in writing. This truſt eſtate is not *fraudulent*, nor *forfeited after the death* of *A.* for HIGH TREASON committed by him during his *life-time.*

The jury found, that one *Simon Mayne* was poſſeſſed of a rectory for a long term, and having conveyed the whole term in part of it to certain perſons abſolutely, he conveyed his term in the reſidue, being two parts, in this manner; *ſcilicet*, in truſt for himſelf during life, and afterward in truſt for the payment of the rent reſerved upon the original leaſe, and for ſeveral of his friends, &c. PROVIDED, that if he ſhould have any iſſue of his body at the time of his death; then the truſts to ceaſe, and the aſſignment to be in truſt for ſuch iſſue, &c. And there was ANOTHER PROVISO, that if he were minded to change the uſes, or otherwiſe to diſpoſe of the premiſes, that he ſhould have power ſo to do by writing in the preſence of two or more witneſſes, or by his laſt will and teſtament. THEY FURTHER FIND, that he had iſſue male at the time of his death, but made no diſpoſition purſuant to his power; and that in his life-time he had committed treaſon; and they find the act of his attainder.

The queſtion was, Whether the reſt of the term that remained unexpired at the time of his death was forfeited to the king?

The points made were two: FIRST, Whether the deed was fraudulent? SECONDLY, Whether the whole Term was not forfeited by reaſon of the truſt or power of revocation?

PEMBERTON argued, that the deed was fraudulent; becauſe he took the profits during his life, and the aſſignees knew not of the deed of truſt. The Court hath in theſe caſes adjudged fraud upon circumſtances appearing upon record without any verdict. The caſe that comes neareſt to this is *Rex v.* * *Earl Nottingham and Others*, in *Lane*, 42. SECONDLY, he argued, that there was a truſt by expreſs words; and if there be a truſt, then

S. C. poſt. 38. S. C. 1. Free. 9. S. C. 1. Vent. 128.

*[17]

S. C. 1. Lev. 279. S. C. 2. Keb. Raym. 120. 10. Mod. 116. Ambler, 32.

564. 608. 644. 763. 772. 7. Co. 13. Lane, 54. 113. Hard. 466. And. 294. 2. Roll. Abr. 34. 1. Roll. Abr. 343. March. 25. 88. 1. Sid. 206. 403. 120. 359. 367. 415. 2. Bac. Abr. 581. 3. Bac. Abr. 756. 2. Hawk. P. C. 639.

SMITH *againſt* WHEELER.

not only the truſt but the eſtate is veſted in the king by the expreſs words of the ſtatute of 33. *Hen.* 8. c. 20. The king, indeed, can have no larger eſtate in the land than the perſon attainted had in the truſt; and if this conveyance were in truſt for *Simon Mayne* only during his life, the king can have the land no longer: but he conceived it was a truſt for *Simon Mayne* during the whole term. A truſt, he ſaid, was a right to receive the profits of the land, and to diſpoſe of the lands in equity. Now if *Simon Mayne* had a right to receive the profits, and a preſent power to diſpoſe of the land, he took it to be a truſt for him; and that conſequently, by his attainder, it was forfeited to the king.

See an Eſſay on the Nature and Laws of Uſes and Truſts, by W. Saunders, 234.

COLEMAN *contra*: As for the matter of fraud; firſt, there is no fraud found by the Jury; and for you to judge of fraud upon circumſtances, is againſt *The Chancellor of Oxford's Caſe*, 10. *Co.* 54. As for the truſt, it muſt be agreed, that if there be any either truſt or condition by conſtruction upon theſe proviſoes in *Simon Mayne* in his life, between *Michaelmas* 1646 and the time of making the act, the truſt will be veſted in the king. But, Whether will it be veſted in the king as a truſt, or as an eſtate? For I am informed that it hath been adjudged between *The King v. Holland (a)*, that if an alien purchaſe copyhold-lands, the king ſhall not have the eſtate but as a truſt; and the particular reaſon was, becauſe the king ſhall not be tenant to the lord of the manor.

(a) Styles Rep. 20. 40. 75. 84. 90. 94. 1. Roll. 194. Aleyn, 14, 15.

KELYNGE, *Chief Juſtice*. The act of parliament takes the eſtate out of the truſtees, and puts it in the king.

COLEMAN. But I ſay, here is no truſt forfeitable. By the body of the deed, all is out of him. If a man make a feoffment in fee to the uſe of his will, becauſe he hath not put it out of him, there ariſes an uſe and a truſt for himſelf. But in our caſe he hath put the uſes out of himſelf; for there are ſeveral uſes declared. But there is a further difference: if *Simon Mayne* had declared the uſe to others abſolutely, and had reſerved liberty to himſelf to have altered it by his will, that might have altered the caſe. But here the proviſo is, that if at the time of his death he ſhall have a ſon, &c.; ſo that it is reduced to him upon a condition and contingency. As to the power of revocation, he cited *The Duke of Norfolk's Caſe (b)* in *Engleſield's Caſe (c)*, which, TWISDEN ſaid, came ſtrongly to this. *Adjournatur (d)*.

(b) 1. Eq. Abr. 192. 3. Chan. Caſes, 1. 14. 38. Pollexfen, 223. 2. Chan. Rep. 229.

(c) 7. Co. 11. 4. Leon. 135. 169.

(d) This Caſe was argued a ſecond time at the bar, in Hilary Term 21. & 22. Car. 2. and in Eaſter Term 23. Car. 2. the judgment was affirmed. Vide poſt. 38, 39.

Anonymous.

* Anonymous. Case 48.

Pleading.

Kelyng. 11. 2. Jones, 156. Cro. Eliz. 144. 2. Hawk. c. 31. ſ. 1.

AN INFORMATION was exhibited againſt one for *a libel*.—COLEMAN. The party has confeſſed the matter in court, and therefore cannot plead *Not Guilty*.—TWISDEN, *Juſtice*. You may plead *Not Guilty* with a *relictâ verificatione*.

Horne *againſt* Ivy. Case 49.

Michaelmas Term, 20. *Car.* 2. *Roll* 401.

The king cannot create a forfeiture by letters patent.

TRESPASS for taking away a ſhip. The defendant juſtifies as ſervant under the patent whereby *The Canary Company* is incorporated, and whereby it is granted, "That none but ſuch "and ſuch ſhould trade thither, on pain of forfeiting their ſhips "and goods, &c." and ſays, that the defendant did trade thither, &c. The plaintiff demurs.

A juſtification to treſpaſs for ſeizing a ſhip as forfeited, by authority of *a corporation*, muſt ſhew that the authority was given by *a deed* by its common ſeal.

S. C. 1. Vent. 47. S. C. 1. Sid. 441. S. C. 2. Keb. 567. 604. 1. Ro. Ab. 514. Dyer, 279. 3. Mod. 126. 4. Mod. 176. 1. Salk. 31. 6. Mod. 13. Gilb. E. R. 213. 1. Vern. 130. 1. Peer. Wms. 656. 12. Mod. 3. 113. 423.

POLLEXFEN *for the plaintiff* contended, that the defendant ought to have ſhewn the deed whereby he was authorized by the Company to ſeize the goods *(a)*; though he agreed, that for ordinary employments and ſervices a corporation may appoint a ſervant without deed, as a cook, a butler, &c. *(b)*. A corporation cannot licenſe a ſtranger to fell trees without deed *(c)*. Nor can they make a diſſeiſor without deed, nor deliver a letter of attorney without deed *(d)*. SECONDLY, The plea is double; for the defendant alledges two cauſes of a breach of their charter, *viz.* their taking in wines at *the Canaries*, and importing them here; which is double. Then there is a clauſe that gives the forfeiture of goods and impriſonment, which cannot be by patent *(e)*. This patent I take alſo to be contrary to ſome acts of parliament, *viz.* 2. *Edw.* 3. c. 1. 2. *Edw.* 3. c. 2. 2. *Rich.* 2. c. 1. 11. *Rich.* 2. c. 2.; and theſe ſtatutes the king cannot diſpenſe withal by a *non obſtante*.

TWISDEN, *Juſtice*. For the firſt point, I think, they cannot ſeize without deed, no more than they can enter for a condition broken without deed.

KELYNGE, *Chief Juſtice*. We deſire to be ſatisfied, Whether this is *a monopoly* or not?—It was ordered to be argued again *(f)*.

(a) 26. Hen. 6. pl. 8. 14. Edw. 4. pl. 8. Bro. "Corporation," 59.

(b) Plowd. 95.

(c) 12. Hen. 4. pl. 17.

(d) 9. Edw. 4. pl. 59. Bro. "Corporation," 24. 34. 14. Hen. 7. pl. 1. 7. Hen. 7. pl. 9. 1. Roll. Abr.

(e) 8. Co. 125. Noy, 123.

(f) It appears in *Keble* and *Ventris*, that judgment was given in this caſe for the plaintiff, on the firſt objection, becauſe the defendant juſtified by the command of *a corporation*, without ſhewing that his authority to ſeize the ſhip was by *a deed*; and S. C. *Siderfin* ſays, that the Court alſo held the bar bad in ſubſtance, becauſe the king by his *patent* cannot create a *forfeiture* for the doing thoſe things which his patent prohibits, ſee 3. Peer. Wms. 424. Hardres, 55. Skinner, 135. 224. 8. Co. 125. Palmer, 5. 3. Lev. 353. 1. Salk. 32. 5. Com. Dig. "Trade," (B.). 1. Burr. 526. 1. Term Rep. 118.

Caſe 50.

* Pryn *againſt* Smith.

To a *ſcire facias* againſt bail, A PLEA of *caption* and *eſcape* of the principal muſt ſhew out of *what court the writ* iſſued.
Poſt. 24.
S. C. 2. Keb. 567.
Moor, 883.
2. Bulſt. 260.

SCIRE FACIAS in the court of king's bench upon a recognizance by way of bail upon a writ of error in the Exchequer Chamber. The defendant pleaded, That the plaintiff did, after judgment, ſue forth a *capias ad ſatisfaciendum* out of this court to the ſheriff of *Middleſex*, whereupon he was taken in execution, and ſuffered to eſcape by the plaintiff's own conſent.—JONES, *for the plaintiff.* We have demurred, becauſe they do not lay the place where this court was holden, nor where the plaintiff gave his conſent.

Cro. Jac. 163. Dougl. 58. 2. Term Rep. 754.

Caſe 51.

Redman *againſt* Pyne.

To ſay of *a watchmaker*, that he is "a "bungler, and "cannot make "a good piece "of work," is not actionable.
Poſt. 23.
S. C. 2. Keb. 568.
Sid. 425.
1. Lev. 276.
Raym. 184.
2. Show. 136. 293.
N. Lut. 334.
1. Ld. Ray. 610.
2. Ld. Ray. 1417. 1480.
2. Stra. 797. 420. 591.

AN ACTION UPON THE CASE was brought for ſpeaking theſe words of the plaintiff, being a watchmaker: "He is *a bungler*, "and knows not how to make a good piece of work:" but there was no *colloquium* laid of his trade.

PEMBERTON. The jury have ſupplied that, having found that he is *a watchmaker*. And it is true, that words ſhall be taken *in mitiori ſenſu*; but that is when they are doubtful. *Cawdry v. Highley*, *Cro. Car.* 270. (*a*).

TWISDEN, *Juſtice.* I remember *a ſhoemaker* brought an action againſt a man for ſaying that he was *a cobler*; and though a cobler be a trade of itſelf, yet it was held that the action lay, in GLYN's time.

SAUNDERS. If he had ſaid, that he could not make a good watch, it would have been known what he had meant: but the words in our caſe are indifferent, and perhaps had no relation to his trade.—The judgment was ordered to be ſtayed.

6. Mod. 215. 8. Mod. 221. 10. Mod. 111. 196. 198. 12. Mod. 3. 307. 344. Fitzg. 121. 253.

(*a*) S. C. Godb. 441.

Caſe 52.

Vere *againſt* Reyner.

Certainty.
Ante, 8.
Poſt. 46. 257.
S. C. 2. Keb. 573.

AN ACTION UPON THE CASE upon a promiſe to carry *duas carectatas*, &c.—ROTHERAM. It is uncertain whether "*ca*-"*rectata*" ſignifies a *horſe-load*, or a *cart-load*.—Judgment *niſi*, &c.

This was *a demurrer* to the declaration; and it was objected, that the promiſe being to carry two cart-loads *ſeptimanatim*, one after the other, it ought to have ſhewn when; but judgment was given for the plaintiff, becauſe no day being appointed, it ſhall be intended immediately following the promiſe. S. C. 2. Keb. 573. For a deſcription of the ſeveral kinds of *certainty* required in pleadings, ſee Rex v. Horne, Cowp. 682. Dougl. 158.

Veal

* Veal *againſt* Warner. Caſe 53.

Eaſter Term, 21. Car. 2. Roll 514.

TWISDEN. I have known, if a judgment be given, and there is an agreement between the parties not to take out execution till next Term, and they do it before, that the Court has ſet all aſide.

The Court will ſtay proceedings if *execution* be taken out contrary to agreement.

Poſt. 24.—S. C. 2. Keb. 568. 2. Term Rep. 183. And ſee the S. C. 1. Saunders, 326.

Anonymous. Caſe 54.

ONE brought up by *habeas corpus* out of the *Cinque Ports*, upon an information for *breaking priſon*, where he was in cuſtody upon an execution for debt. BARRELL moved againſt it.

A priſoner in execution, in the *cinque ports*, may be brought up by *habeas corpus*, and charged with an action out of that juriſdiction.

TWISDEN, *Juſtice.* Suppoſe a man be arreſted in the *Cinque-Ports* for a matter ariſing there, and then another hath cauſe to arreſt him here, is there not a way to bring him up by *habeas corpus?*

Cro. Jac. 543. 1. Sid. 386. 6. Mod. 22. 12. Mod. 666.

BARRELL. It was never done; but there has been a *habeas corpus* thither *ad faciendum & recipiendum.*

KELYNGE, *Chief Juſtice.* If a man be in priſon in THE FLEET, we bring him up by *habeas corpus* in caſe there be a ſuit againſt him here.

TWISDEN, *Juſtice.* Where ſhall ſuch a man be ſued upon a matter ariſing out of the *Cinque Ports?*

BARRELL. If it be tranſitory, it muſt be ſued there; if local, elſewhere.

TWISDEN, *Juſtice.* Then you grant, if local, that there muſt be a *habeas corpus.*—And ſo it was allowed in this caſe *(a)*.

(a) But ſee the caſe of Melſome *v.* Gardner, Cowp. 116. and the ſtatute 4. & 5. Will. & Mary, c. 21. ſ. 3.

The King *againſt* Burrell. Caſe 55.

TWO JUSTICES OF THE PEACE made an order in ſeſſion-time againſt one *Reignolds*, as reputed father, for the keeping of a baſtard-child: *Reignolds* appealed to the ſame ſeſſions, where the juſtices made an order that one *Burrell* ſhould keep it.

An appeal againſt an order of baſtardy muſt be to *the next* ſeſſions after notice.

JONES moved to ſet aſide this order, though an order of ſeſſions upon an appeal from two juſtices; becauſe, he ſaid, the firſt order being made in ſeſſion-time, that ſeſſions could not be ſaid to be *the next* within the ſtatute of 18 *Eliz.* c. 5. and becauſe the juſtices of the ſeſſions did not quaſh the order made by two juſtices.

S. C. 2. Keb. 575. S. C. 1. Vent. 48. 2. Bulſt. 355. 2. Salk. 476. 472. 478. 480. 482. 486. 534. 2. Bulſt. 341. 5. Mod. 208. 329. 10. Mod. 84. 271. 1. Ld. Ray. 394. 471. 2. Ld. Ray 1198. 1363. 1423. 3. Peer. Wms. 275. 6. Mod. 7. Dougl. 632. 3. Term Rep. 496. See Conſt's Edit. of Bott, vol. i. 441 to 447.

THE KING *againſt* BURRELL.

KELYNGE, *Chief Juſtice.* They ought to have done that.

TWISDEN, *Juſtice.* They may vacate the firſt order, and refer it back to two juſtices as *res integra.*

An order of maintenance to pay ſo much a week "till "the child is "twelve years "old," is bad.

THE ORDER being read, one clauſe of it was, That *Burrell* ſhould pay twelve-pence a week for keeping the child, till it came to be twelve years of age. This TWISDEN, *Juſtice,* ſaid was ill; for it ought to be, ſo long as it continues chargeable to the pariſh.—The parties were bound over to appear at the next aſſizes in *Eſſex.*

1. Sid. 222. 1. Vent. 48. 336. 1. Salk. 121, 2. Salk. 478. Annally's Rep. 160. 2. Stra. 788. 3. Burr. 1679. See Mr. Conſt's Edition of Bott's Poor Laws, vol. i. page 432 to 441.

*[21]

Caſe 56.

* Darbyſhire *againſt* Cannon.

An *attachment* lies for non-performance of an award made a *rule of Court*; but the defendant may plead "*no award.*"

SYMPSON moved, That the defendant having ſubmitted to a rule of Court for referring the matter, and not performing the award, *an attachment* might be granted againſt him; which was granted: but when the party comes in upon *the attachment*, he may alledge, that the award is void; and, if it appear to be ſo, he ſhall not be bound to perform it.

S. C. 2. Keb. 575. 3. Mod. 170. 10. Mod. 333. 12. Mod. 257. 317. 434. 525. 533. 585. 1. Stra. 695. 2. Peer. Wms. 450. 1. Barnes, 40. 2. Barnes, 55. 140. Salk. 71. 83. 1. Atk. 355. Sayer, 48. 2. Burr. 701. 3. Burr. 1258. Cowp. 23. 1. Term Rep. 266.

See the ſtatute 9. & 10. Will. 3. c. 15. Kyd on Awards, 189.

Caſe 57.

Owen Hanning's Caſe.

On a *ſcire facias* to avoid a patent office, a perſon who is to be deputy to the plaintiff in caſe the patent is repealed may be examined as a witneſs.

IN a trial at bar upon a *ſcire facias* to avoid a patent of the *office of ſearcher*, exception was taken to a witneſs, that he was to be deputy to the party that would avoid the patent.—TWISDEN, *Juſtice,* If a man promiſe another, that if he recover his land the other ſhall have a leaſe of it, he is no good witneſs: ſo neither is this man.—But by the opinion of the THREE OTHER JUDGES he was allowed, becauſe the ſuit here is between the king and the patentee.

S. C. 2. Keb. 576. 6. Mod. 60. 10. Mod. 151. 193. 12. Mod. 372. 1. Peer. Wms. 288. 2. Ld. Ray. 1108. 2. Vern. 375. 463. Prec. Ch. 234. Abr. Eq. 223. Comyns, 90. 2. Stra. 1253. Buller's N. P. 285. 3. Wilſ. 97. Gilb. Evidence, 4th Edit. 123. 1. Term Rep. 163. 262. 296.

Caſe 58.

Worthy *againſt* Liddall.

The ſpiritual court may proceed againſt a perſon for calling a woman a *whore.*

SAUNDERS moved for a prohibition to the ſpiritual court, in a ſuit there, for calling the plaintiff "Whore."

TWISDEN, *Juſtice.* Opinions have been *pro* and *con* upon this point. The ſpiritual court has a juriſdiction in caſes of whoredom

1. Sid. 433. S.C. 2. Keb. 577. 581. S.C. 1. Vent. 61. S. P. 1. Vent. 7. Cro. Car. 110. 2. Roll. Abr. 297. 1. Vent. 7. 220. 2. Lev. 63. Skin. 390. 6. Mod. 114. 8. Mod. 48. 112. 117. 140. 208. 12. Mod. 13. 236. 2. Ld. Ray. 809. 1101. 1136. 1287. 2. Stra. 823. 946. 1100. Salk. 692. Bunb. 312. 4. Com. Dig. "Prohibition" (G 14.). Carſlake *v.* Mapledoram, 2. Term Rep. 473.

whoredom and adultery; but if ſuits there were allowed for ſuch railing words, they would have work enough from *Billingſgate*.

WORTHY *againſt* LINDALL.

SAUNDERS relied upon this, that they were only words of heat.

KELYNGE, *Chief Juſtice*. They are judges of that.

SAUNDERS. In Michaelmas Term, 11. Jac. Roll 664. *Cryer v. Glover*, in the common pleas, the ſuggeſtion was, that ſhe ſtruck him, and he ſaid, "Thou art a *whore*, and I was never ſtruck by "*a whore's hand* before." There a prohibition was granted; and I conceive the reaſon was, becauſe there was a provocation. So in our caſe it * appears that they were ſcolding. According 15. Jac. 1. Roll 325. *Short v. Cole*, *Noy*, 114. and in the 15. *Car.* 2. in the caſe of *Loveland v. Gooſe*, 2. *Keb.* 334.—THE COURT refuſed to grant a prohibition.

* [22]

Maddox *againſt* Peterborough.

Caſe 59.

WALLOP moved for *a prohibition* to the ſpiritual court for one *Maddox*, incumbent of *a donative* within the dioceſe of *Peterborough*, who was cited into the ſpiritual court for marrying there without a licence; and cited *Farechild's Caſe*, *Telv.* 60.

The ſpiritual court may proceed againſt the incumbent of a *donative* for marrying perſons without *a licence*.

S. C. 2. Keb. 578.
S. C. 1. Sid. 432.

BUT by KELYNGE, *Chief Juſtice*, MORETON AND RAINSFORD, *Juſtices*, the prohibition was denied. TWISDEN doubted; but ſaid, if they might puniſh him in the eccleſiaſtical court *pro reformatione morum*, at leaſt they could not deprive him.

Ante, 11. Poſt. 90. Jones, 259. Hob. 290. 2. Ld. Ray. 1205. 2. Stra. 715. 1056.

Vide the caſe of Powell *v.* Milborne, 3. Wilſ. 355. and Campbell *v.* Aldrich, 2. Wilſ. 79. Annally's Rep. 326. and the Marriage Act of 26. Geo. 2. c. 33. ſ. 8. by which it is made *felony* to ſolemnize matrimony without the publication of banns, or *licence* firſt had and obtained from thoſe who have authority to grant the ſame. See alſo 21. Geo. 3. c. 53. 1. Term. Rep. 396. 403.

Doctor Poordage.

Caſe 60.

BARTUE moved for *a writ of privilege* for him, he being *a practiſing phyſician* in town, and choſen conſtable in a pariſh.

A *phyſician* is not exempted, by the common law, from being elected conſtable.

S. C. 2. Keb. 578.
S. C. 1. Sid. 431.

THE COURT ſaid, if the office go by houſes, he muſt make a deputy. But upon conſideration the motion was refuſed; and a difference made between *an attorney* or *barriſter at law*, and *a phyſician*. The former enjoy their privilege, becauſe of their attendance in publick courts, and not upon the account of any private buſineſs in their chambers; and a phyſician's calling

Ante, 13. 1. Roll. Abr. 533. 541. 1. Lev. 233. Comyns, 312. 6. Mod. 12. 19. 10. Mod. 353. 1. Stra. 698. 2. Stra. 1107.

Doctor Pocrdage.

is a private calling: Wherefore they would not introduce new precedents (a).

(a) The defendant was a member of the college of phyſicians in *London*, and was choſen conſtable of the pariſh of *Bradfield* in *Berkſhire*, for a houſe he had there. It is ſaid in *Siderfin*, that he was diſcharged; but in Pindar v. Daily, Comb. 31. by WYTHERS, *Juſtice*, the report by *Siderfin* is ſaid to be good law; and S.C. 2. Keble, 578, ſtates the cuſtom of *Bradfield*, and agrees, that the writ of privilege lay not.—By the 32. Hen. 8. c. 40. members of the College are excuſed from the office in *London*. See alſo the 5. Hen. 8. c. 6. 6. Will. 3. c. 4. 2. Hawk. P. C. 100. See alſo Rex v. Gouge, Cowp. 13. Rex v. Clark, 1. Term Rep. 679.

Caſe 61.

Sir John Kirle *againſt* Oſgood.

To ſay of a juſtice of the peace that "*he is forſworn, and not fit to be a juſtice, or to ſit upon the bench,*" is actionable.

AN ACTION FOR WORDS, VIZ. "*Sir John Kirle* is a for- "ſworn juſtice, and not fit to be a juſtice of the peace, "to ſit upon the bench; and ſo I will tell him to his face (a)." Moved in arreſt of judgment, Becauſe to ſay a man is *forſworn* is not actionable; for it may be underſtood of ſwearing in common * diſcourſe.

* [23]

S.C. 1. Vent. 50. S. C. 2. Keb. 548. 579. S.C. 1. Lev. 280. S.C. 1. Sid. 432. 1. Ro. Ab. 57. N. Lutw. 409. 3. Mod. 139. 169. 1. Lev. 52. Stile, 22. 210. 2. Ld. Raym. 812. 1369. 1. Stra. 617. 2. Stra. 1168. 6. Mod. 270. 8. Mod. 195. 10. Mod. 186. 12. Mod. 195.

JONES. The words are actionable, becauſe applied to his office; as in *Stukely v. Bulhead*, 4. *Co.* 16. and *Fleetwood's Caſe*, in *Hobart* 267. Though a man's office is not named, yet if the words do refer in themſelves, or are applied to it, they are actionable: ſo in our caſe.

WINNINGTON. They are not actionable, for they admit of a conſtruction *in mitiori ſenſu*: in *Stukely's Caſe* that has been cited, corruption in his office is neceſſarily implied, but not in this caſe. *Roll* 56.

KELYNGE, *Chief Juſtice*. He calls him in effect a corrupt juſtice; and that ſupplies the communication concerning his office: words muſt be conſtrued according to common accepta- tion.

MORTON, *Juſtice*. I ſee little difference between this and *Sir John Iſam's Caſe*, *Cro. Car.* 14. and *Sir William Maſſam's Caſe*, *Cro. Car.* 223.

RAINSFORD, *Juſtice*, accorded. He cited 1. *Roll* 53. and 4. *Co.* 16. *Stukely's Caſe*.

TWISDEN, *Juſtice*, was of the ſame opinion; for the words tend to diſgrace him in his office.—Judgment for the plaintiff.

(a) See Rex v. Berry, 4. Term Rep. 217.

Caſe 62.

The Caſe of Haſtings, an Attorney.

An attorney ſworn and admitted into any of the *ſuperior courts* may practiſe in any *inferior court*, unleſs ſuch court, by charter or preſcription, is reſtrained to a certain number, in excluſion of others. Poſt. 118.—S. C. 2. Keb. 580. S. C. 1. Sid. 410. 1. Vent. 11. 1. Lev. 75. Raym. 14. 5. Mod. 310. 1. Salk. 1. 173. 6. Mod. 26. 106. 3. Lev. 54. 2. Sid. 410. 1. H. Bl. Rep. 50.

WINNINGTON complained to the Court on the ſaid *Haſtings*'s behalf, that he being an attorney of this court was not ſuffered to appear for his client in the court at *Stepney*.

That

That court, he ſaid, was erected by letters patents within theſe two years; and the attornies of this court, being an ancient court, ought not to be excluded. THE CASE OF HASTINGS, AN ATTORNEY.

On the other ſide it was urged, that they had a certain number of attornies appointed by their charter, as there is at THE MARSHAL'S COURT.

KELYNGE, *Chief Juſtice.* This is a new court; and for my part, I think our attornies cannot be excluded. *Haſtings* may bring his action. If a patent erecting a new court may limit a certain number of *attornies* who ſhall practiſe there, it may as well limit a certain number of *counſel.*

COLEMAN. They have ſo in THE MARSHALSEA and in *London.*

KELYNGE, *Chief Juſtice.* Their courts in *London* are ancient, and their cuſtoms confirmed by acts of parliament. The now court of THE MARSHALSEA is indeed a new-erected court (for the old court of THE VERGE was another thing); and as for their having a certain number of counſel or attornies, the queſtion is the ſame with this before us, Whether they can legally exclude others? I do not ſee how the king, by a new patent, can ouſt any man of his privilege.

TWISDEN, *Juſtice*, ſaid it was a * new point, and that he had never heard it ſtirred before.—Afterwards being moved again, KELYNGE, *Chief Juſtice*, ſaid, they ſhould have their judgments quickly, if they ſtood upon it (*a*). * [24]

(*a*) The Court directed *Haſtings* to bring an action on the caſe againſt THE PROTHONOTARY of *Stopney Court* for refuſing to record his appearance for his client. S. C. 1. Sid. 410.; but the queſtion does not appear to have been determined. S. C. 2. Keb. 580.

Anonymous. Caſe 63.

TWISDEN, *Juſtice.* I have known this ruled, If you ſay you will refer the cauſe to ſuch a man, that *ex conſequente* the cauſe muſt ſtay, becauſe that man is made judge; and that the ſtaying of the cauſe is implied in the reference. Proceedings ſhall be ſtayed on a cauſe being referred.

Ante, 20.

2. Barnes, 53. 8. Mod. 170. 10. Mod. 205. 333.; but by 2. Ld. Ray. 789. no reference whatſoever ſhall ſtay proceedings, unleſs it be ſo expreſſed in the rule of reference.—See alſo 3. Crompton, 263. Impey, 571. and the ſtatute 9. & 10. Will. 3. c. 15.

The King *againſt* Vaws. Caſe 64.

MOVED to quaſh a preſentment for refuſing to be ſworn conſtable of an hundred, becauſe the preſentment does not mention before whom the ſeſſions were held, which was quaſhed accordingly; and TWISDEN, *Juſtice*, ſaid, the clerk of the peace ought to be fined for returning ſuch a preſentment. A *preſentment* for refuſing to be ſworn a conſtable muſt ſtate before *whom* the ſeſſions was held.

S. C. 2. Keb. 580. Cro. Eliz. 738. 5. Mod. 96. 129. Comb. 416, 1. Ld. Ray. 215. 638. 2. Ld. Raym. 1305. 1. Salk. 343. 2. Stra. 832. 865. 2. Hawk. P. C. 302. 320. 360. Dougl. 534. 3. Term Rep. 513.

Birrell

Caſe 65. Birrell *againſt* Shaw.

Plea to a *ſcire facias* againſt bail, that the principal had paid, muſt ſtate *the place* where.

Ante, 19.

2. Keb. 517.

SCIRE FACIAS againſt the bail. The defendant pleads, that before the return of the writ of *ſcire facias*, there was a *capias ad ſatisfaciendum* againſt the principal, by virtue whereof he was taken, and paid the money; but alledges no place where the payment was.—TWISDEN, *Juſtice*. You cannot make good this fault.

2. Term Rep. 45. 576.

Caſe 66. Dodwell and his Wife *againſt* Burford.

In treſpaſs, the Court will not increaſe the damages if the injury was conſequential.

S. C. 1. Sid. 433.

S. C. 2. Danv. 451.

2. Lev. 172.

1. Roll. Rep. 36.

1. Ray. 739.

Cro. Jac. 350.

TRESPASS. The plaintiffs, in an action of battery, declared, that the defendant ſtruck the horſe whereon the wife rode, ſo that the horſe ran away with her, whereby ſhe was thrown down, and another horſe ran over her, whereby ſhe loſt the uſe of two of her fingers.

The jury had given them forty-eight pounds damages, and they moved the Court upon view of the *mayhem* to increaſe them; whereupon the declaration was read.

But THE COURT thought the damages given by the jury ſufficient (*a*).

Cro. Car. 192. 11 Co. 5. 1. Ld. Ray. 38. 2. Stra. 872. 1083. Bull. N. P. 25.

(*a*) As to the increaſe of damages, 2. Wilſ. 248. 368. 374. 3. Wilſ. ſee 1. Ld. Ray. 176. 1. Wilſ. 5. 62.

*[25]

Caſe 67. * Smith *againſt* Bowin.

An infant may maintain an action upon a contract made for his benefit, but he cannot be ſued upon it himſelf.

Poſt. 137.

S. C. 1. Vent. 51.

S. C. 2. Keb. 581.

S. C. 2. Danv. 770.

1. Roll. Abr. 19. 729.

1. Jones, 157. 405.

ACTION upon a promiſe. The plaintiff declares, That the defendant, in conſideration that the plaintiff would ſuffer him to take away ſo much of the plaintiff's graſs which the defendant had cut down, promiſed to pay him ſo much for it, and alſo to pay him ſix pounds which he owed him for a debt. After a verdict for the plaintiff,

WILLIAMS moved in arreſt of judgment, that the plaintiff was *an infant*, and he not being bound by the agreement, that the defendant ought not to be bound by it neither.

KELYNGE, *Chief Juſtice*. If an infant let you a houſe, ſhall he not have an action againſt you for the rent?

TWISDEN, *Juſtice*. I have known an action upon the caſe brought by an infant upon a promiſe to pay ſo much money, in conſideration that he would permit the defendant to enjoy ſuch a

Cro. Car. 502. Co. Lit. 308. Godb. 364. Hob. 77. Noy, 92. 130. 4. Leon. 4. 1. Sid. 41. 446. 9. Mod. 103. 10. Mod. 26. 67. 85. 139. 12. Mod. 197. 243. Fitzg. 175. 276. 1. Peer. Wms. 558. 718. 734. 2. Peer. Wms. 244. 298. 519. (645.). 3. Peer. Wms. 208. Stra. 937. Ld. Ray. 443. 1. Atk. 146. Caſ. Temp. King, 46. Powell on Contracts, 38. 1. Com. Dig. "Aſſumpſit" (B. 14.). 3. Burr. 1794. Gilb. Law of Evid. 4th edit. 184. Cowp. 128. 1. Term Rep. 40. 648. 2. Term Rep. 159. 766. 3. H. Bl. Rep. C. B. 75.

houſe:

houſe: it was long inſiſted upon, that this was not a good conſideration, becauſe it is not reciprocal; for the infant might avoid his promiſe if an action were grounded upon it againſt him: but it was adjudged to be a good conſideration, and that the action was maintainable. SMITH *againſt* BOWIN.

THE COURT, in the principal caſe, gave judgment for the plaintiff, *niſi. &c.*

Bear *againſt* Bennett. Caſe 68.

TWISDEN, *Juſtice.* When a man is arreſted, and has lain in priſon *three Terms*, and is diſcharged upon *common bail*, Whether ſhall the plaintiff ever hold the defendant to *ſpecial bail* afterward for the ſame cauſe, if he begins anew? A plaintiff muſt declare within *three Terms*, or the defendant ſhall be diſcharged on common bail. S. C. 2. Keb. 582. March. 157. Prac. Reg. 65. Cowp. 72. 128.

KELYNGE, *Chief Juſtice.* If he may, then may a man be kept in priſon for ever at that rate.

At laſt it was agreed, that if he would pay the defendant his coſts for lying ſo long in priſon he ſhould have ſpecial bail.

171. 3. Mod. 274. 1. Com. Dig. "Bail" (21.).

Howard *againſt* the Chancellor of Saliſbury. Caſe 69.

MR. MASTERS moved for *a prohibition* to the ſpiritual court, to ſtay a ſuit there againſt a man for having married his wife's ſiſter's daughter, alledging the marriage to be out of the Levitical degrees.—THE COURT. Take *a prohibition*, and demur to it; for it is a caſe of moment. A man may marry his wife's ſiſter's daughter. Co. Lit. 235. 2. Lev. 254. Ray. 464.

3. Lev. 364. 2. Jones, 118. 2. Vent. 9. Vaugh. 206. Ld. Ray. 68. Stra. 534

By 32. Hen. 8. c. 38. all perſons not prohibited by the *Levitical degrees may* lawfully intermarry. Soon after making of the act *Lord Cromwell* applied for a diſpenſation for one *Maſſey*, who was contracted to the *ſiſter's daughter of his late wife*; but the archbiſhop denied it, as contrary to the law of God; for as it is expreſſed, that the *nephew ſhall not marry his uncle's wife*, it is implied, that the *niece ſhall not be married to the aunt's huſband*. Gibſon, 412, 413. In the caſe of Wortley *v.* Watkinſon, Trin. 31. Car. 2. a conſultation was awarded for the ſame reaſon upon the like proximity. 3. Keb. 660. 2. Lev. 254. 2. Jones, 118. 2. Shower, 70. acc. Cro. Eliz. 228. S. C. *cont.* Moor, 907.; but in Eaſter Term, 3. Geo. 1. the court of common pleas refuſed to prohibit a ſuit in the ſpiritual court for marrying his wife's ſiſter's daughter, although caſes were quoted where ſuch a marriage had been held lawful, Denny *v.* Aſhwell, Stra. 53.; and it has been alſo held, that the marrying of *a baſtard*, who if legitimate would have been within the like degree, is illegal, Harris *v.* Jeffel, 1. Ld. Ray. 68. See 2. Burn's Ecc. Law, 434. and note (1), Co. Lit. 235. a.

* The King *againſt* Turnith. Caſe 70.

TREVOR moved to quaſh an indictment upon 5. *Eliz.* c. 2. for exerciſing the trade of a grocer at *Cheſhunt*, in *Hertfordſhire*, not having ſerved as an apprentice to it for ſeven years; The caption of an indictment on 5. *Eliz.* c. 2. muſt ſtate it to have been found at the *quarter* ſeſſions. Salk. 370. 2. Ld. Ray. 767. 1038. 1. Burr. 252.

THE KING *againſt* TURNITE.

years; becauſe the ſtatute ſays, they ſhall proceed at the *quarter* ſeſſions, and the word "*quarter*" is not in the indictment.—TWISDEN, *Juſtice*. That word "quarter" ought to be in.

The reſtraints of 5. *Eliz.* c. 2. do not extend to trades carried on in *country villages*.

S. C. 1. Vent. 51.

TWISDEN, *Juſtice*. And I believe the uſing of a trade in a country village as this is, is not within the ſtatute.—MORETON, *Juſtice*, accorded.—RAINSFORD, *Juſtice*. It will be very prejudicial to corporations not to extend the ſtatute to villages.—TWISDEN, *Juſtice*. I have heard all the Judges ſay, that they will never extend that ſtatute farther than they needs muſt (*a*).

S. C. 2. Keb. 583. 8. Co. 129. 11 Co. 84. 1. Salk. 373.

An indictment quaſhed for want of the *adtunc et ibidem*.

S. C. 2. Keb. 583. Cro. Eliz. 108. 6. Mod. 220. 2. Mod. 51. 10. Mod. 148.

Further objection was made, That there wanted theſe words, "*adtunc et ibidem onerati et jurati*;" for which all the three Judges, KELYNGE, *Chief Juſtice*, being abſent, conceived it ought to be quaſhed.

(*a*) The ſame caſe in *Keble* and *Ventris* agree, that country villages are not within the reſtraint of the act; and this is confirmed by Rex v. Langley, 1. Seſſ. Caſes, 183. 2. Bar. K. B. 225.: but Ball v. Cobus, 1. Burr. Rep. 366. and Bull. N. P. 192. *contra*; though the Court ſaid, that it had been the common practice to find for the defendant, on evidence that he followed the buſineſs only in a ſmall village.

Caſe 71.

Moreton *againſt* Packman.

By the cuſtom of London, a married woman may bring an action as a *feme ſole trader* without her huſband. *Quære*, If the trade of *a victualler* be within this cuſtom?

S. C. 2. Keb. 583.

S. C. 2. Dan. 422.

Lit. Rep. 31.

Hetl. 9.

2. Brownl. 219.

Cro. Eliz. 68.

Moor, 135.

8. Mod. 253.

10. Mod. 6. 33. 70.

11. Mod. 253.

1. Show. 183.

A CAUSE was removed out of *London* by *habeas corpus*, wherein the plaintiff had declared againſt the defendant as a *feme ſole merchant*.

BARTUE moved for a *procedendo*; becauſe, he ſaid, they could not declare againſt her here as a *feme ſole*, for that ſhe had a huſband.

JONES, *contra*. The huſband may then be joined with her, for he is not beyond ſea.

TWISDEN, *Juſtice*. I think a *procedendo* muſt be granted for the cauſe alledged. It was reſolved in *Langham v. Bewett*, in *Cro. Car.* 68. (though not reported by him), that if the wife uſe the ſame trade that her huſband does ſhe is not within the cuſtom. And they are to determine the matter there, Whether this caſe be within their cuſtom? Perhaps a victualler (as this trade is) is not ſuch a trade as their cuſtom will warrant: and whether it will warrant it or not is in their judgment.—A *procedendo* was granted.

12. Mod. 603. Gilb. Eq. Rep. 83. Prec. Ch. 24. 328. 2. Vern. 104. 2. Peer. Wms. 144. 371. 451. 496.

1. Com. Dig. 544. 3. Burr. 1376. 1776. 3. Term Rep. 618. And ſee Caudel v. Shaw, 4. Term Rep. 361. where it is determined that a *feme covert* cannot ſue without her huſband as a feme ſole trader by the cuſtom of London in the *ſuperior courts* at Weſtminſter. See alſo the caſe of Read v. Frances Jewſon, Hilary Term, 13. Geo. 3. there cited from a manuſcript note by Mr. JUSTICE BULLER.

Tomlin

*Tomlin *againſt* Fuller.

Caſe 72.

A SPECIAL ACTION ON THE CASE was brought for keeping a paſſage ſtopped up, ſo that the plaintiff could not come to cleanſe his gutter.

If a man have a right of way through another houſe, he cannot uſe it at *unſeaſonable hours*, nor bring an action for ſtopping the way, without *notice* and *requeſt* to have it opened. S.C. 1. Vent. 48. S. C. 2. Keb. 575. 583. 1. Lev. 289. 5. Co. 101. Cro. Eliz. 395. Cro. Jac. 652. N. Lutw. 114. 135. 2. Salk. 457. 585. 6. Mod. 200. 260. 1. Ld. Ray. 713. 1. Ter. Rep. 560.

HARDRES, after verdict for the plaintiff, moved in arreſt of judgment, that there ought to have been a requeſt for the opening of it.

BARWELL anſwered, It is true, where the nuſance is not by the party himſelf, there muſt be notice before the action brought; but in this caſe the wrong began in the defendant's own time.

TWISDEN, *Juſtice*. I know this hath been ruled: where a man made a leaſe of a houſe, with free liberty of ingreſs, &c. through part of the leſſor's houſe, the leſſor notwithſtanding might ſhut up his doors, and was not bound to leave them open for his coming in at one or two of the clock at night, but he muſt keep good hours. And muſt the defendant in this caſe keep his gate always open expecting him? Wherefore it ſeems he ought to have laid a requeſt. It is not good at the common law; and the defendant might well have demurred for that cauſe. Judgment for the plaintiff. It is aided by the verdict.

Butler *againſt* Play.

Caſe 73.

A bill of exchange muſt be *proteſted* within a *reaſonable time*. S. C. 2. Keb. 584. 1. Lev. 9. 41. 97. 124.

UPON a motion for a *new trial* in a cauſe where the matter was upon proteſting a bill of exchange—SERJEANT MAYNARD ſaid, the proteſt muſt be on the day that the money becomes due.—TWISDEN, *Juſtice*. It hath been ruled, that if a bill be denied to be paid, it muſt be proteſted *in a reaſonable time*, and that is within a fortnight; but the debt is not loſt by not doing it on the day (*a*).—A new trial was denied.

2. Salk. 644. 648. 653. 10. Mod. 37. 286. 294. 316. 12. Mod. 244. 309. 345. 1. Ld. Ray. 743. 2. Ld. Ray. 993. 1. Stra. 415. 508. 550. 707. 2. Stra. 829. 910. 1175. 1195. 1248.

(*a*) Formerly what was the *reaſonable time* in which *the holder* of an inland bill of exchange ſhould give notice to the *indorſer* of the non-acceptance and non-payment thereof, ſo as to prevent the *indorſer* from being diſcharged by the *laches* of the holder, was conſidered as a queſtion of *fact* for the determination of THE JURY. 1. Black. Rep. 1. 1. Ld. Raym. 744. 1. Stra. 415, 416. 550. 910. 1248. 1175. and the caſe of Metcalf *v.* Hall, Beawes, 482. Dougl. 515. But it is now ſettled, in the caſe of Tindal *v.* Brown, 1. Term Rep. 167. that this is a queſtion of *law* for the opinion of THE COURT. The rule now is, that when the drawee of an inland bill refuſes to accept or pay, and the parties to whom notice is to be given reſide at a different place from the holder and the drawee, the notice of non-acceptance or non-payment muſt be ſent by *the next poſt*. [illegible]'s Treatiſe, 80. And when [illegible] to notice reſides in the ſame place, or at a place at a ſmall diſtance from that in which the holder lives, the demand of payment muſt be made, and notice, in the caſe of non-payment, given, as ſoon as, under all the circumſtances, it is poſſible to do. See Dougl. 515. 681. 1. Term Rep. 171. 714. 2. Term Rep. 713. In the *notice* to be given of the non-acceptance or non-payment of *inland bills* no particular *form of words* is neceſſary, but it is ſufficient if it appear, that *the holder* means to give no credit to *the acceptor*, and to hold *the drawer* and *the indorſers* to their reſponſibility; but in *foreign bills* other formalities are required; for which ſee Malyne, 264. Ld. Ray. 743. Beawes, 460. Bull. N. P. 271. 2. Term Rep. 713.; the ſtatutes 9. & 10. Will. 3. c. 17.; the 3. & 4. Ann. c. 9.; and Kyd's Treatiſe on Bills and Notes, page 87 to 102.

Caſe 74.

* Hughes *againſt* Underwood.

The *ſealing* of a writ of error is a *ſuperſedeas* to the execution, even though the *writ* varies from *the record*.

Poſt. 45. 106. 112. 285. 195. Yelv. 6. Vent. 97. Fitzg. 175. 8. Mod. 70. 78. 107. 197. 240. 272. 12. Mod. 398. 501. 1. Ld. Ray. 10. 47. 71. 405. 2. Ld. Ray. 896. 1295. 1. Stra. 632. 2. Stra. 867. 1186. 1. Barnes, 275. 2. Barnes, 164. 170. 3. Bac. Abr. 210. See the caſe of Jaques v. Nixon, 2. Term Rep. 279.

KELYNGE, *Chief Juſtice*. The very *ſealing* of the writ of error is a *ſuperſedeas* to the execution.

TWISDEN, *Juſtice*. There was once a writ of error to remove the record of a judgment between ſuch and ſuch; but ſome of the parties names were left out: and by my brother WYLDE's advice, that writ not removing the record, they took out execution. But the Court was of opinion, that though the record was not removed thereby (of which yet, they ſaid, he was not judge whether it was or not) yet that it ſo bound up the cauſe, that they could not take out execution. It is indeed good cauſe to quaſh the writ of error when it comes up, but execution cannot be taken out.

HILARY TERM,

The Twenty-Firſt and Twenty-Second of Charles the Second.

IN

The King's Bench.

Monday, 24 *January*, 1670.

Sir John Kelynge, *Knt. Chief Juſtice*,

Sir John Twiſden, *Knt.*
Sir William Moreton, *Knt.*
Sir Richard Rainsford, *Knt.* } *Juſtices.*

Sir Jeoffry Palmer, *Knt. Attorney General.*
Sir Heneage Finch, *Knt. Solicitor General.*

* Jefferſon, Executor of Jefferſon, *againſt* Dawſon and Others. Caſe 75.

IN a *ſcire facias* upon a recognizance in chancery entered into by one *Garraway*, there was *a demurrer* to part, and *iſſue* upon part. And the queſtion was, Whether this Court could give judgment upon the demurrer?

If a *ſcire facias* be brought in the king's bench, on a recognizance in chancery, and there be *a demurrer* as to part, and *an iſſue* on a part, yet the king's bench ſhall give judgment upon the whole record.

JONES. The judgment upon the demurrer muſt be given in chancery. The court of chancery cannot try an iſſue, and therefore it is ſent hither to be tried; but with the demurrer this court has nothing to do. Indeed, the books differ in caſe of an iſſue ſent hither out of chancery, whether the judgment ſhall be here or there? *Keilway* ſays (*a*) it ought to be given here. *Lord Coke* ſays (*b*) it muſt be given in chancery: but none ever made it a queſtion, Whether judgment upon a demurrer were to be given here or there? *Vide Coke's* "*Juriſdiction of Courts*," *fol.* 80.

S. C. 2. Saund. 23. S. C. 1. Lev. 283. S. C. 1, Sid. 436. S. C. 2. Keb. 529. 584. 608. 621. 636. S. C. 3. Keb. 25. 31. 129. 243. S. C. 1. Danv. 776. 1. Roll. 437. 8. Co. 23. 2. Co. 157. 9. Co. 99. 1. Term Rep. 316.—(*a*) Keilw. 98. a.—(*b*) 4. Inſt. 79. 88. 294.

SAUNDERS

JEFFERSON, *againſt* DAWSON, AND OTHERS.

SAUNDERS *contra.* When there is a demurrer upon part, and iſſue upon part, the record being here, this Court ought to give judgment; becauſe there can be but one execution.

KELYNGE, *Chief Juſtice.* If the record come hither entirely, we cannot ſend it back again: I cannot find any authority that the record ſhould be removed from hence. He cited *Keilway* 94. 21. *Hen.* 7. 2. *Co.* 12. *Coke's Entries*, 678. 24. *Ed.* 3. *fol.* 65. There it is held, that judgment ſhall be given here upon a demurrer. Now if it muſt not be given here, there muſt be two executions for the ſame thing, or elſe they muſt loſe half, for they can have but one *elegit.*

Rex v. Pearnley. 1. Term Rep. 380.

At another day THE JUDGES gave their opinions ſeverally, that judgment ought to be given in this court upon the whole record; for that it is an entire record, and the execution one: and if judgment were to be given there upon the demurrer, there muſt be two executions. And becauſe the record ſhall not be remanded.

*[30]

TWISDEN, *Juſtice*, ſaid, the record itſelf was here, and that it had been ſo adjudged in *Holland's Caſe*, (*a*) and in *Dawkes v. Batter*: though *my Lord Chief Baron, being then at the bar, urged ſtrongly, that it was but the tenor of the record that was ſent hither; and it is a maxim in law, that if a record be here once, it never goes out again; for that here it is *coram ipſo rege*: ſo that if we do not give judgment here, there will be a failure of juſtice, becauſe we cannot ſend the record back. The jury that tries the iſſue muſt aſſeſs the damages upon the demurrer. The record muſt not be ſplit in this caſe.—Accordingly judgment was given here.

(*a*) 22. Edw. 4. pl. 23.

Caſe 76. Willbraham *againſt* Snow.

A ſheriff may maintain either *trover* or *treſpaſs* for goods taken out of his poſſeſſion after ſeizure by virtue of a *fieri facias*; for he has a ſpecial property in them after ſeizure; but in *trover* he can only recover the value of the goods; and not, as he may in *treſpaſs*, damages for the *tortious taking.*

TROVER AND CONVERSION.—Upon iſſue *not guilty*, the jury find a ſpecial verdict, *viz.* That one *Talbot* recovered in an action of debt againſt one *Wimb*, and had a *fieri facias* directed to the ſheriff of *Cheſter*; whereupon the ſheriff took the goods into his poſſeſſion; and that being in his poſſeſſion, the defendant took them away, and converted them, &c.

The ſole point was, Whether the poſſeſſion which the ſheriff has of goods by him levied upon an execution, is ſufficient to enable him to bring an action of trover?

WINNINGTON. I conceive the action does not lie. An action of trover and converſion is an action in the right, and two things are to be proved in it, *viz.* a property in the plaintiff, and a converſion in the defendant. I confeſs, that in ſome caſes, though the plaintiff have not the abſolute property of the goods, yet as to the defendant's being a wrong-doer, he may have a ſuffi-

S. C. 2. Saund. 47. S. C. 1. Sid. 438. S. C. 1. Vent. 52. S. C. 1. Lev. 282. S. C. 2. Keb. 588. 2. Saund. 47. 345. 438. Clayt. 113. 2. Mod. 245. Cro. Jac. 50. Cro. Car. 89. 2. Salk. 655. 6. Mod. 212. 291. 10. Mod. 21. 25. 37. 140. 1. Ld. Raym. 276. 736. 2. Str. 996. 1. Stra. 128. 505. 1. Burr. Rep. 452. Bull. N. P. 33. 3. Wilſ. 332. 1. Term Rep. 75. 658.

cient

tiff property to maintain the action against him. But I hold, that in this case the property is not at all altered by the seizure of the goods upon a *fieri facias*, for which he cited *Dyer* 98, 99; and *Ayre v. Aden*, *Yelv.* 44 (*a*). This case is somewhat like that of commissioners of bankrupts: they have power to sell, and grant, and assign; but they cannot bring an action: their assignees must bring all actions. It is true, a sheriff in this case may bring an action of trespass, because he has possession; but trover is grounded upon the right, and there must be a property in the plaintiff to support that; whereas the sheriff takes the goods by virtue of a naked authority: as when a man deviseth, that his executors shall sell his land, they have but a naked authority. WILLRAHAM *against* SHOW.

CURIA. The sheriff may well * have an action of trover in this case. As for the case in *Yelv.* 44. there the sheriff seized upon a *fieri facias*; then his office determined; then he sold the goods, and the defendant brought trover. And it was holden, that the property was in the defendant, by reason of the determining of the sheriff's office; and because a new *fieri facias* must be taken out; for that a *venditioni exponas* cannot issue to the new sheriff. They compared this case to that of a carrier, who is accountable for the goods that he receives, and may have *trover* or *trespass* at his election. * [31].

TWISDEN, *Justice*, said, The commissioners of bankrupts might have an action of trover, if they did actually seize any goods of the bankrupts, as they might by law.

RAINSFORD, *Justice*, said, Let the property, after the seizure of goods upon an execution, remain in the defendant, or be transferred to the plaintiff, since the sheriff is answerable for them, and comes to the possession of them by law, it is reasonable that he should have an ample remedy to recover damages for the taking of them from him, as a carrier has that comes to the possession of goods by the delivery of the party.—MORETON, *Justice*, said, If goods are taken into the custody of a sheriff, and the defendant afterward become bankrupt, the statute of bankrupts shall not reach them; which proves the property not to be in the defendant.

TWISDEN, *Justice*. I know it hath been urged several times at the assizes, that a sheriff ought to have *trespass* and not *trover*; and counsel have pressed hard for a special verdict.

MORETON, *Justice*. My Lord Chief Justice BRAMPSTON said, he would never deny a special verdict while he lived, if counsel did desire it (*b*). Co. Lit. 155. b.

(*b*) Judgment was given for the plaintiff.

(*a*) See S. C. Moor, 757. Cro. Jac. 73. Dalton's Sheriff, 19. ad- judged contrary to the report of it, Yelv. 44.

Caſe 77.

Gavell and his Wife *againſt* Berked.

To ſay, "You "are a pimp "and a bawd, "and fetch "young gen- "tlewomen to "young gentle- "men," is actionable, without laying any ſpecial damage.

* [32]

8. C. 1. Sid. 438.
8. C. 1. Vent. 53.
8. C. 2. Keb. 389.
1. Ro. Ab. 44.
Cro. Eliz. 229. 261.
Cro. Car. 329.
1. Ld. Ray. 710.
2. Ld. Ray. 1004.
2. Stra. 1169.
6. Mod. 215.
10. Mod. 385.
12. Mod. 106. 307. 344. 597. 633.
2. Term Rep. 473.

ACTION for words, *viz.* "You are *a pimp* and *a bawd*, and fetch young gentlewomen to young gentlemen." Upon iſſue *not guilty*, there was a ſpecial verdict found.

JONES. The declaration ſays further, "whereby her huſband "did conceive an evil opinion of her, and refuſed to cohabit with her." But the jury not having found any ſuch ſpecial damage, the queſtion is, Whether the words in themſelves are actionable, without any relation had to the damage alledged? I confeſs * that to call one BAWD is not actionable; for that is a term of reproach uſed in ſcolding, and does not imply any act whereof the temporal courts take notice; for one may be ſaid to be "a bawd" to herſelf. But where one is ſaid to be a bawd in ſuch actions as theſe, it is actionable. 27. *Hen.* 8. *pl.* 14. If one ſay, that another holds bawdry, it is actionable. So alſo in *Penſon v. Gooday*, *Cro. Car.* 329. "Thou keepeſt a whore in thy houſe to pull out my throat:" theſe words have been adjudged to be actionable; for that they expreſs an act done; and ſo are ſpecial, and not general railing words. In the caſe of *Dimock v. Fawcett*, *Cro. Car.* 393 two Juſtices were of opinion, that the word "pimp" was actionable of itſelf. But I do not rely upon that, or the word "bawd," but taking the words all together, they explain one another. The latter words ſhow the meaning of the former, *viz.* that her pimping and bawdry conſiſted in bringing young men and women together, and what ſhe brought them together for is ſufficiently expreſſed in the words "pimp" and "bawd," *viz.* that ſhe brought them together to be naught: and that is ſuch a ſlander as, if it be true, ſhe may be indicted for it, and is puniſhable at the common law.

THE COURT was of the ſame opinion, and gave judgment for the plaintiff, *niſi*, &c.

Caſe 78.

Healy *againſt* Warde.

An *aſſumpſit* in an inferior court to pay on requeſt, *the place* of requeſt muſt be ſtated, and alledged to be *within the juriſdiction of the Court.*

ERROR of a judgment in *Hull.*—WESTON. The action is brought upon a promiſe, *cùm inde requiſitus foret*; and does not ſay, *cum inde requiſitus foret infra juriſdictionem.*—TWISDEN, *Juſtice.* Though the agreement be general, *cùm inde requiſitus foret*, yet if he do requeſt within the juriſdiction, it is good enough; and ſo it has been ruled.—And this error was diſallowed.

S. C. 1. Vent. 2. S. C. 2. Keb. 437. Poſt. 63. 1. Vent. 28. 72. 1. Lev. 50. 69. 96. 153. 2. Show. 430. 3. Lev. 243. 2. Lev. 87. 1. Saund. 74. 2. Mod. 30. 141. 197. 6. Mod. 224. See the caſe of Rowland v. Veal, Cowp. 18. Trevor v. Wall, 8. Term Rep. 151.

Roſwell

Boſwell, &c. Executors of Gibbs, *againſt* Coats. Caſe 79.

TWO ſeveral legacies are given by will to *Alice Coats* and *John Coats*. The executors depoſit theſe legacies in a third perſon's hand for them, and take a bond of that third perſon, conditioned, that, "if the obligor at the requeſt of ſhall bring in *Alice* "and *John Coats*, when they ſhall come to their ages of twenty-"one years, to give ſuch a releaſe to the executors of *Francis* "*Gibbs* as they ſhall require, THEN, &c." One of the legatees comes of age, and during the minority of the other the bond is put in ſuit; and this whole matter is diſcloſed in the pleading.

A condition that the obligor ſhall procure a *releaſe* for two *ſeveral* legacies, from *two infants* when they come of age, ſhall be taken *reſpectively* when each of them attain the age of twenty-one.

S. C. 2. Keb. 591. S. C. 1. Vent. 58. 1. Saund. 184. Cro. Jac. 295. 1. Vern. 83. 2. Vern. 478.

The queſtion was, Whether the defendant was obliged to bring him in, to give a releaſe, that was of age before the action brought, or might ſtay till both were of age before he procured a releaſe from either?

THE COURT was of opinion, that it muſt be taken *reſpectively*; and becauſe it appears that the legacies were ſeveral, that ſeveral releaſes ought to be given, upon the reaſon of Juſtice *Wyndham's Caſe*, 5. *Co.* 7. (*a*); and TWISDEN, *Juſtice*, ſaid, If there were no more in it than this, *ſcil.* "when they ſhall come to their ages "of, &c." it were enough to have the condition underſtood reſpectively; for they cannot come to their ages at one and the ſame time.—And judgment was given accordingly.

(*a*) S. C. Noy, 6. Moor, 191. Jenk. 278.

Trethuny *againſt* Ackland. Caſe 80.

Michaelmas Term, 21. *Car.* 2. *Roll* 218.

TWISDEN, *Juſtice*. If an executor plead ſeveral judgments, you may reply to every one of them, that they were obtained by fraud; or you may plead "*ſeparalia judicia, &c. obtent. per* "*fraudem*;" but in pleading *ſeparalia judicia obtent. per fraudem*, if one be found to be a true debt, you are gone.

Pleading.

S. C. 2. Saund. 48. S. C. 2. Keb. 591. Poſt. 175.

1. Lev. 281. 3. Lev. 115. 267. Vaugh. 94. 1. Vent. 199.

Parker *againſt* Welly. Caſe 81.

Trinity Term, 21. *Car.* 2. *Roll* 1503.

KELYNGE, *Chief Juſtice*, and TWISDEN, *Juſtice*. Notwithſtanding the ſtatute of 23. *Hen.* 6. c. 9. which obliges the ſheriff to take bail, yet he can make no other return of a *capias* than either "*cepi corpus*," or "*non eſt inventus*;" for at the common law he could return nothing elſe; and the ſtatute 23. *Hen.* 8. c. 9. though it compels him to take bail, does not alter the return; and ſo in a caſe of *Franklin v. Andrews* (*b*), it has been adjudged here.

The ſheriff muſt return "*cepi* "*corpus*," or "*non eſt in-*"*ventus*," to a writ of *capias ad ſatisfaciendum*.

S. C. poſt. 57. S. C. 2. Saund. 155. 2. Saund. 59.

S. C. 2. Keb. 607. 657.

Case 82.

* Crofton's Case.

If a statute create *a new offence*, and inflict a penalty to be recovered by "*bill, plaint*, "or *informa-* "*tion*," yet an *indictment* will lie, except there be the negative words, "and "not otherwise."

S.C. 1. Sid. 439. S.C. 1. Vent. 63. S. C. 2. Keb. 595. 614. 7. Co. 36. 10. Co. 75. 11. Co. 88. 1. Ro. Ab. 106. 2. Inst. 163. Cro. Jac. 577. 4. Mod. 144. Carth. 263. 1. Ld. Ray. 347. 2. Ld. Ray. 991. 2. Stra. 828. 10. Mod. 336. 12. Mod. 30. 104. 117. 223. 446. 502. 634. Fitzg. 47 65. 1. Burr. 545. 2. Burr. 803. 1129. 2. Hawk. P. C. 9. 302.

OFFLEY moved for a *certiorari* to the justices of the peace for *Middlesex*, to remove an indictment against one *Crofton*, upon the late statute 17. *Car.* 2. c. 2. made against nonconformist ministers coming within five miles of a corporation: the indictment was traversed. He urged, that by the statute no indictment will lie for such offence; for where an act of parliament enacts, that the penalty shall be recovered by bill, plaint, or information (as the statute upon which this indictment is grounded does), there an indictment will not lie; as in *Castle's Case*, *Cro. Jac.* 643.

TWISDEN, *Justice*. If the statute appoint, that the penalty shall be recovered by bill, plaint, &c. and not otherwise, there I confess an indictment will not lie; but without negative words I conceive it will, though the statute be introductive of *a new law*, and create an offence which was none at the common law: for whenever a thing is prohibited by a statute, if it be a public concern (*a*), an indictment lies upon it: and the giving other remedies, as by bill, plaint, &c. in affirmative words, shall not take away the general way of proceeding which the law appoints for all offences.

KELYNGE, *Chief Justice*, differed in opinion, and thought, that where a statute created a new offence and appointed other remedies, there could be no proceeding by way of indictment.

Afterward OFFLEY moved it again, and cited *Castle's Case*, *Cro Jac.* 643. *Gadlow v. Whitecot*, *Cro. Eliz.* 544. MAGNA CHARTA 201 and 228.—Upon the second motion, KELYNGE came over to TWISDEN's opinion (*b*).

If a statute distribute a penalty to the *king*, the *informer*, and the *poor*, and the king sues alone, yet *the poor* shall have their *third part*, though there is no informer.

BUT IT WAS OBJECTED, that upon an indictment the poor of the parish would lose their part of the penalty: to which

(*a*) See S. P. Rex *v.* Jones, Mich. 14. Geo. 2.

(*b*) The reports of this case in *Keble*, *Siderfin*, and *Ventris*, agree, that the Court refused to quash the indictment; but *Siderfin* adds, "*mes nota que ceo fuit* "ZACH. CROFTON'S Case," and in the margin says, "QUÆRE *per. moy.*" In the case of *Rex v. Marriott*, 1. *Show.* 399. the determination of *Crofton's Case* is doubted; in *Rex v. Manning*, *Fitzg.* 47. the Court expressly deny it to be law; and in *Rex v. Wright*, 1. *Burr. Rep.* 543. LORD MANSFIELD says, that it had been *denied* many times:—The law upon this subject seems now to be, that where *new offences* are prohibited by a general prohibitory clause in a statute, an indictment will lie. 1. Burr. 545. that if a statute prescribe a particular mode of punishing an *old offence*, such particular mode is cumulative, and does not take away the former remedy, 2. Burr. 799.; but that where a statute enacts, that the doing an act not punishable before shall for the future be punished in such and such a particular manner, then the common-law method by indictment cannot be pursued, 2. Burr. 805. 834.; for wherever a *new offence* is created by statute, and a *special jurisdiction* out of the course of the common law is prescribed, it must be followed. Hartley *v.* Hooker, Cowp. 524. See also Cowp. 650. 3. Term Rep. 442.

TWISDEN

TWISDEN ſaid, that he knew it to have been adjudged otherwiſe at *Serjeant's-Inn*; and that where a ſtatute appoints the penalty to be divided into three parts; one to *the informer*, another to *the king*, and the third to *the poor*; that in ſuch caſe where there is no informer, as upon an indictment, there the king ſhall have two parts, and the poor a third. CROFTON'S CASE.

* The King *againſt* Baker. Caſe 83.

AN INDICTMENT in *Hull* for ſaying theſe words, *viz.* that "whenever a burgeſs of *Hull* comes to put on his gown, "*Satan* enters into him."—LEVINZ moved, that theſe words would not bear an indictment.—KELYNGE, *Chief Juſtice*. The words are a ſcandal to Government. Slandering a corporation is a ſcandal on the Government. S. C. 2. Keb. 594.

3. Mod. 139. 8. Mod. 270. 11. Mod. 166. 195. 12. Mod. 414. 1. Ld. Ray. 153. 2. Ld. Ray. 1029. 1369. Stra. 420. 617. 1152. 1168. Fort. 206. 2. Salk. 698. 1. Term Rep. 316.

LEVINZ. The indictment concludes, "*in malum exemplum* "*inhabitantium*;" whereas it ſhould be, "*quamplurimorum ſub-* "*ditorum domini Regis in tali caſu delinquentium.*"—And for this adjudged naught. An indictment concluding, "to "the evil ex- "ample of the "inhabitants," is bad. 10. Mod. 186.

Anonymous. Caſe 84.

TWISDEN, *Juſtice*. If the defendant in an action of debt for rent plead *nil debet*, he may give in evidence a ſuſpenſion of the rent. Evidence on *nil debet*. Poſt. 118.

Amiles *againſt* Chambers. Caſe 85.

A PARSON libels in the ſpiritual court againſt ſeveral of his pariſhioners for *tithe-turf*: they pray a prohibition. KELYNGE, *Chief Juſtice*. Turf, gravel, and chalk, are part of the freehold, and not tithable. *Turf* is not titheable. 2. Inſt. 651.

THE COURT granted one prohibition to all the libels; but ordered the plaintiffs to declare ſeverally. Prohibition. S. C. 2. Keb. 596.

March, 58. 94. Yelv. 128. 2. Mod. 77. 12. Mod. 47. 2. Vern. 46. Abr. Eq. 366. 1. Ld. Ray. 137.

Maleverer, late Sheriff of York, *againſt* Redſhaw. Caſe 86.

Trinity Term, 21. *Car.* 2. *Roll* 1511.

DEBT upon a bond of forty pounds; the condition was, for appearing at a certain day; concluding, that if the party appeared, then *the condition* to be void. The defendant pleaded the ſtatute 23. *Hen.* 6. c. 9. A ſheriff's bond conditioned, "that if the "party appear, "then *the con-* "*ditions* to be void," is good; for the latter words ſhall be rejected as ſurpluſage.—S. C. 1. Sid. 456. S. C. 2. Saund. 78. S. C. 1. Vent. 39. S. C. 2. Keb. 536. 596. 625. Hob. 14. 1. Ld. Ray. 38. 1. Wilſ. 351.

MALIVERER *againſt* REDSHAW.

COLEMAN. The bond is void by the expreſs words of the ſtatute, being taken in other form than the ſtatute preſcribes.

KELYNGE, *Chief Juſtice.* If the condition of a bond be, "that "if the obligor pay ſo much money, then the condition to be "void," in that caſe the bond is abſolute.

TWISDEN, *Juſtice.* I have heard LORD HOBART ſay upon this occaſion, that becauſe the ſtatute would make ſure work, and not leave it to expoſition what bonds ſhould be taken, therefore it was added, "that bonds taken in any other form ſhould be void:" for, ſaid he, the ſtatute is like *a tyrant*; where he comes he makes all void; but the common law is like *a nurſing father*, makes void only that * part where the fault is, and preſerves the reſt.

* [36]

KELYNGE, *Chief Juſtice.* If the condition had been, "that "the party ſhould appear," and had gone no farther, it would then have been well enough.

TWISDEN, *Juſtice.* Then why may not that which follows be rejected, as idle, and ſurpluſage?—*Cur. adviſare vult* (*a*).

(*a*) By the 23. Hen. 6. c. 9. no ſheriffs, &c. ſhall take any *obligation* of perſons in their cuſtody but only to themſelves, by the name of their office; and UPON CONDITION written, that the ſaid priſoner ſhall appear at the day and in the place appointed by the writ; and concludes, that if they take *any obligation* in other form it ſhall be *void*. The objection in this caſe was, that the bond made *the condition*, inſtead of *the obligation*, void, and therefore was not in the form preſcribed by the ſtatute; for that although the obligor appeared at the day, yet the condition only being made void by that appearance, the bond would remain ſingle and in force. But THE COURT were of opinion, that the bond was good; for that the words "then "this obligation to be void" might be rejected as ſurpluſage; and judgment was accordingly given for the plaintiff. S. C. 2. Saund. 78. S. C. 1. Sid. 456.

Caſe 87. Jones *againſt* Treſilian.

To aſſault and battery the defendant may plead it was in defence of his poſſeſſion; but if he ſays, *molliter inſultum fecit* inſtead of *molliter manus impoſuit*, it is bad on demurrer. S.C. 1. Sid. 441. S.C. 1. Lev. 282. S.C. 2. Keb. 597. 2. Ro. Ab. 548. N. Lutw. 287. 470. 481. 11. Mod. 229. 1. Ld. Ray. 62. Lutw. 1483.

AN action of treſpaſs of aſſault and battery. The defendant pleads, *ſon aſſault demeſne*. The plaintiff replies, that the defendant would have forced his horſe from him, whereby he did *molliter inſultum facere* upon the defendant in defence of his poſſeſſion. To this the defendant demurred.

MORETON, *Juſtice.* *Molliter inſultum facere* is a contradiction. Suppoſe you had ſaid, that *molliter* you ſtruck him down.

TWISDEN, *Juſtice.* You cannot juſtify the beating of a man in defence of your poſſeſſion, but you may ſay that you did *molliter manus imponere*, &c.

KELYNGE, *Chief Juſtice.* You ought to have replied, that you did *molliter manus imponere, quæ eſt eadem tranſgreſſio.*

THE COURT. *Querens nil capiat per billam*, unleſs better cauſe be ſhown this Term.

Leach

Leach *againſt* Morris, Executor of Adams. Caſe 88.

Michaelmas Term, 21. Car. 2. Roll 619.

IN an action of debt for not performing an award, the plaintiff declares, that *inter alia arbitratum fuit, &c.* TWISDEN, *Juſtice.* That is naught (*a*).

A declaration in DEBT, that *inter alia* it was awarded, is bad.

S. C. 2. Keb. 601. 623. 659. 1. Lev. 292. 1. Sid. 161. Comyns, 328. 547. 450. 3. Peer. Wms. 187. 190. 361. 2. Peer. Wms.

(*a*) It is ſaid 2. Keb. 601. that judgment on demurrer was given for the plaintiff. And ſee Litt. 312. Comyn's Dig. "Arbitrament," (I 2.) and (I 5.) Kyd on Awards, page 198. and 1. Burr. Rep. 280.

Jackſon and Criſp *againſt* the Mayor of Berwick. Caſe 89.

Trinity Term, 20. Car. 2. Roll

AN action of covenant is brought againſt the mayor, burgeſſes, and corporation of *Berwick* upon an indenture of demiſe, wherein the plaintiffs declare, that the defendants did demiſe to them a houſe in *Berwick* with a covenant, that the plaintiffs ſhould enjoy the ſame without interruption by them, or any other perſon or perſons * whatſoever; and alledge, that a ſtranger claiming a title did make an entry upon them, and kept them out of poſſeſſion. The defendants plead a local plea; *to wit*, that the ſaid ſtranger did not enter upon the plaintiffs, &c.; upon which iſſue is joined. The plaintiffs then make a *ſuggeſtion*, and pray a *venire facias* into the next county: upon which there is a trial.

In covenant on leaſe dated at *York*, of lands in *Berwick*, and iſſue joined on a breach aſſigned in *Berwick*, the * [37] plaintiff, on a ſuggeſtion that *Berwick* is in *Scotland*, may change the *venue* to the next adjoining *Engliſh county*.

JONES conceived this to be a *miſ-trial*, and that the *venire* ought to have been *de vicineto* of the caſtle of *York*, where the covenant is alledged to have been made.—FIRST, this fault is not aided by any of the ſtatutes of jeofails; not by the laſt and greateſt of all: that aids where the *venire facias* is awarded from another place than it ought to be, but not when awarded from another county (*a*); which is my exception. That, at the common law, this *venire facias* is not well awarded, I rely upon *Dowdale's Caſe*, 6. *Co.* 46. If an action be brought upon a matter done out of the kingdom, the trial will be where the action is laid. In our caſe, the action is grounded upon an indenture ſuppoſed to be made within the county of *York*; but iſſue is joined upon a matter done out of the kingdom, for ſo *Berwick* is. This iſſue, I conceive, ought to be tried where the action is laid. It is true, in the caſe of *Wales*, the law is otherwiſe; for I find, that *Wales* is parcel of the

S. C. 1. Sid. 381. 462. S. C. 1. Lev. 252. S. C. 1. Vent. 58. 90. S. C. Raym. 173. S. C. 2. Keb. 391. 414. 602. Poſt. 64. 68. 199. 6. Co. 46. 1. Saund. 247. 2. Mod. 10. 8. Mod. 374.

Vaugh. 395. 2. Saund. 193. Raym. 206. 1. Lev. 291. 12. Mod. 7. 10. Mod. 30. 325. 6. Mod. 194. 1. Ld. Ray. 331. 581. 2. Ld. Ray. 1214. 1408. 1418. 1. Salk. 183. 1. Stra. 428. 553. 630 704. 2. Stra. 954. 3. Burr. 1330. 1. Com. Dig. "Action" (N 12.). Cowp. 178. 409. 510. Rex v. Amory, 1. Term Rep. 363. 3. Term Rep. 387.

(*a*) The 16. & 17. Car. 2. c. 8.; 2. Lev. 164. 1. Com. Dig. "Amendment" (H 3.) and ſee 3. Vent. 58. 90. 1. Sid. 381.

JACKSON AND CRISP *againſt* THE MAYOR OF BERWICK.

realm of *England*, though the king's writs do not run there. But *Berwick* is part of the realm of *Scotland*, and was conquered by king *Edward the Fourth*, and acts of parliament name *Berwick*. When *Calais* was in poſſeſſion of the kings of *England*, and a matter ariſing within *Calais* came in iſſue, was ever any *venire facias* awarded to *Dover*?

TWISDEN, *Juſtice*. There are two precedents of ſuch trials, one in 12. *Eliz. Roll.* 630. and in 2. *Roll.* 97. I have aſked my brother WITHRINGTON, who is a knowing man, how it came to paſs that *Berwick* was put into acts of parliament? He ſaid, he knew no other reaſon than that the Recorder of *Berwick* was at firſt in parliament and deſired it, and therefore it hath continued ever ſince. —MR. WESTON ſaid, that the caſe of *Shirley v. Sackrel*, *Cro. Eliz.* 465. was an authority (*a*).

(*a*) In Trinity Term 22. Car. 2. the Court was of opinion, that the *venire* was well awarded to the adjoining county, 1. Vent. 90. and judgment was ultimately given for the plaintiff. Ray. 174. 1. Lev. 252.

The delay of the Court in giving judgment ſhall not operate to the prejudice of the parties.

In this caſe it happened, that during the *Cur. adviſare vult*, one of the plaintiffs died; and the queſtion was, What ſhould be done?—TWISDEN, *Juſtice*. There is a caſe in *Latch.* 92. wherein this difference is taken, *viz.* If there be no continuance entered, you may enter the judgment as at the *day in bank*: but if continuances are entered, * then you cannot go back, but muſt enter the judgment to the time of the continuances.—It was put off for counſel to be heard in it (*b*).

* [38]

12. Mod. 130. Comyns, 31. 1. Ld. Ray. 695. 2. Ld. Ray. 849. 869. Stra. 1081. Burr. 2277.

(*b*) THE COURT was of opinion, that there being no *continuances* the judgment ought to be entered as if it had been immediately given on the return of the *poſtea*, 1. Vent. 90.; for that it would be unreaſonable that the delay of *the Court* ſhould prejudice the plaintiff. 1. Sid. 463.

Caſe 90.

Smith *againſt* Wheeler.

Eaſter Term, 20. *Car.* 2. *Roll* 570.

A *king's counſel* cannot plead againſt the Crown.

3. Bl. Com. 26. 28.

SERJEANT MAYNARD was about to argue in this caſe, that the reſidue of the term was not forfeited to the king.

KELYNGE, *Chief Juſtice*. BROTHER MAYNARD, you would do well to be adviſed, whether or no you, being of the king's counſel, ought to argue in this caſe againſt the king?

MAYNARD anſwered, that the king's counſel would have but little to do, if they ſhould be excluded in ſuch caſes; and that SERJEANT CREW argued *Haviland's Caſe*, in which there was the like queſtion.

TWISDEN, *Juſtice*. In *Stone v. Newman*, I know the king's counſel did argue againſt eſtates coming to the Crown: but if MY LORD

LORD thinks it not proper, my BROTHER MAYNARD may give his argument to ſome gentleman at the bar to deliver for him.

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Afterwards, in *Eaſter Term* 22. *Car.* 2. 1670, the caſe came to be argued again.—JONES argued *for the plaintiff* in the writ of error:—FIRST, Whether this ſettlement be fraudulent or no? That fraud is not to be preſumed, he cited the *Chancellor of Oxford's Caſe*, 10. *Co.* 54. and the Caſe of *Criſpe v. Pratt*, *Cro. Car.* 550. But for THE SECOND POINT, he held, that here is a truſt forfeitable to the king; and he quoted *Sir John Dacomb's Caſe*, *Cro. Jac.* 512. That the truſt in this caſe is forfeited, he proved from the nature of a truſt, which is an equitable intereſt, or a right of perception of the profits of an eſtate: the *ceſtui que truſt* hath *jus habendi*, *et jus diſponendi*. And though he that hath a truſt, hath in law neither *jus in re*, nor *jus ad rem*, yet in equity he hath both. In equity, whatever I have a right to diſpoſe of, I have a right to take the profits of. For if a man make a conveyance to the uſe of one and his heirs, in truſt, that he ſhall convey over, though it is not expreſſed that he ſhall take the profits, yet he ſhall take them. Now in the ſecond proviſo there is a double expreſſion; one that amounts to a revocation, the other amounting to a diſpoſition or limitation. Now he that hath a power of diſpoſition, hath a right that may be forfeited: and therefore the *Duke of Norfolk's Caſe* comes not to this, for we are not in the power of * revocation; I decline that, but we are in a power of diſpoſition. Now this is good by way of truſt. In law indeed ſuch a proviſo is naught, but in a truſt the intention of the parties carries it. I obſerve in forfeitures at the common law, where a man hath only *jus diſponendi*, though he hath no eſtate, yet he may forfeit it, *Plo. Com.* 260. A man is poſſeſſed of a term in the right of his wife, though he hath no eſtate himſelf, yet he may forfeit it: and the reaſon is, becauſe he hath *jus diſponendi*. If a man might by ſuch a diſpoſition as this protect his eſtate from being forfeited, little land would come to the Crown upon attainders. There are two badges of ownerſhip: the one is a perception of the profits, the other a power of diſpoſing; both which are in our caſe; and a favourable conſtruction ought not to be put upon a deed for encouragement of traitors.

A. being poſſeſſed of *a term* for eighty years, aſſigns part of the premiſes, and ſettles the reſidue *in truſt* on himſelf for life, with divers remainders over; provided, that if he had iſſue the truſts ſhould ceaſe, and the aſſignment be in truſt for ſuch iſſue, with a power of revocation. If *A.* commit treaſon, the remainder of the original term is only forfeited during his life.

* [39]

S. C. Ante, 16. S. C. 1. Freem. 9. S. C. 1. Vent. 128. S. C. 1. Lev. 279. S. C. 2. Keb. 564. 608. 644. 763. 772. 2. Inſt. 216. 9. Co. 121. 1. And. 294. Lane, 54. 113. Hard. 466. Raym. 120. 1. Roll. Abr. 343. 2. Ro. Ab. 34. March. 45. 88. 1. Sid. 260. 2. Hawk. P. C. 639. 10. Mod. 116. 120. 359. 361. 367. 415.

WINNINGTON *contra*. As for THE FIRST POINT, the fraud ought to be found; and this leaſe was made long before the attainder, or the treaſon committed.—For THE SECOND POINT, the queſtion will be, What our law calls a truſt? then I ſhall examine, Whether there was ſuch a thing in *Mayne* at the time of his deceaſe? A truſt I find to be a confidence repoſed in the perſon, that another ſhall take the profits, and that the truſtee ſhall convey according to his directions: this I gather from theſe books, viz. *Plowd.* 352. *Delamere's Caſe*, 1. *Co.* 121, 122. *Co. Lit.* 272. Now if theſe two qualities, or either, ſhall fail in this caſe, then *Simon Mayne* had no truſt to forfeit, for that the caſe will depend upon

SMITH *against* WHEELER.

upon the true ſtating the words of the deed. For the firſt proviſo, it doth not cohere with any of theſe qualities; for by virtue of that proviſo he could not be ſaid to have any right: he hath no *jus diſponendi* but upon contingencies. If he hath no children, he hath no ſuch power; nay, if he have children, they muſt be living at his death. Further, by theſe proviſoes, if the contingencies do happen, he hath but a power to declare the uſes; he hath no intereſt in him at all: *Litt. ſect.* 463. It is one thing to have a power or poſſibility of limiting an intereſt; another to have an intereſt veſted. 7. *Co.* 11. and *Moor's Rep.* 366. about the delivery of a ring; where they hold, that if it had been to have been done with his own hand, it had not been forfeited. The Caſe of *Sir Edward Clere* is different from ours; for if a man make a feoffment to the uſe of his laſt will, or to the uſe of ſuch perſons as ſhall be appointed by * his laſt will; in this caſe he remains a perfect owner of the land. But if a man make a conveyance, reſerving a power to make leaſes, or to make an eſtate to pay debts, he hath here no intereſt, but a naked power. The *Duke of Norfolk's Caſe* (*a*) is full in the point: a conveyance to the uſe of himſelf for life, the remainder to his ſon in tail, with power to revoke under hand and ſeal, was adjudged not forfeited; and yet he had a power to declare his mind, as in our caſe.—*Paget's Caſe*, *Moor* 193, 194.

* [40]

(*a*) 7. Co. 13. a. Poph. 18. 1. And. 293. Moor, 303. 4. Leon. 135. Palm. 433. 1. Hale, 245. 2. Hawk. P.C. 643.

KELYNGE, *Chief Juſtice*. If this way be taken, a man may commit treaſon pretty cheaply.

TWISDEN, *Juſtice*. Whoever hath a power of revocation, hath a power of limitation. The reaſon is, becauſe elſe the feoffees would be ſeiſed to their own uſe: *Sir William Shelley's Caſe* (*b*). There is no difference betwixt the *Duke of Norfolk's Caſe* and this; only here it is under his hand-writing, and there under his proper hand-writing.

(*b*) Latch. 102.

Afterward, in *Eaſter Term*, 23. *Car.* 2. 1671, THE COURT delivered their opinions (HALE being then *Chief Juſtice*).

MORETON, *Juſtice*. I conceive the judgment in the common pleas is well given. As for the FIRST POINT, whether this conveyance made by *Sir Simon Mayne* be fraudulent or not, the counſel themſelves have declined it, and therefore I ſhall ſay nothing to it. For THE SECOND, I conceive no larger intereſt is forfeited than during the life of the father. If it be objected, that the father had by this proviſo *jus diſponendi*; I anſwer, It is true, he had a power, if he had been minded ſo to do, but it was not his mind and will. Now *animus hominis eſt ipſe homo*; but he muſt not only be minded ſo to do, but he muſt declare his pleaſure.—HOBART ſaith (*c*), If a man will create a power to himſelf, and impoſe a condition or qualification for the execution of it, it muſt be obſerved. Now here is a perſonal and individual power ſeated in the heart of a man. And it ſeems to me a ſtronger caſe than that

(*c*) In the caſe of Kibbet *v.* Lee, Hob. 312.

of

of the *Duke of Norfolk* (*a*) put in *Engleſield's Caſe* (*b*), where yet the condition was not given to the king by the ſtatute of 26. *Hen.* 8. c. 13. ſ. 5. There was a later caſe adjudged of *Warner v. Hynde* (*c*); a caſe that walked through all the courts in Weſtminſter-hall, there, by reaſon of the *ipſo declarante*, it could not be forfeited.

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(*a*) 7. Co. 13. Poph. 18. Moor 303.

(*b*) 7. Co. 12. 2. Keb. 566. 1. Lev. 279.

(*c*) Latch. 69. 102.

RAINSFORD, *Juſtice*. I hold it is not forfeited. My reaſon is, Becauſe THE PROVISO is at an end and determined; for when he died and no will, there is an end of THE *PROVISO. The altering of the old truſt is to be done by *Sir Simon Mayne*, and it is inſeparable from his perſon: nothing can be more inſeparable than a man's will. *Moore* 193.

*[41]

TWISDEN, *Juſtice*. I am of the ſame opinion.

HALE, *Chief Juſtice*, was of the ſame opinion, That nothing was forfeited but during *Sir Simon's* life. THE PROVISO, he ſaid, did not create a truſt, but *poteſtatem diſponendi*, which is not a truſt. He ſaid, he did not underſtand the difference between the *Duke of Norfolk's Caſe* and this.—Accordingly the judgment was affirmed (*d*).

(*d*) By 7. Ann. c. 21. and 17. Geo. 2. c. 29. no attainder of high treaſon ſhall extend to the diſinheriting of any heir, nor to prejudice the right and title of any perſons, other than the right and title of the offender during his natural life, after the death of the Pretender and his ſons. James the Second married a princeſs of the houſe of Modena, and died at St. Germain's 17 September 1701, leaving one ſon, James Francis, who married Maria Clementina Sobieſky, grand-daughter to the King of Poland, and died in the year 1765, leaving two ſons, *viz.* Charles Edward Lewis Caſimir Stuart, Count of Albany; and Henry Benedict Stuart, Cardinal of York. The Count of Albany married a Princeſs of Stolberg, in Germany, and died at Rome 31 December, 1788, leaving only a natural daughter, whom he had created Ducheſs of Albany. The cardinal of York was born at Rome on the 6 March, 1725; and is ſtill alive and unmarried.

Aſton's Caſe.

Caſe 91.

IN a cauſe wherein one *Aſton* was attorney—KELYNGE, *Chief Juſtice*, ſaid, that a man may diſcontinue his action here, before an action brought in the common pleas: but if he do begin there, and then they plead another action depending here, and then they diſcontinue, I take it, the attorney ought to be committed for this practice.—TWISDEN, *Juſtice*. When I was at the bar, error was brought, and infancy aſſigned, when the man was thirty years old; and the attorney was threatened to be turned out of THE ROLL.

If an attorney diſcontinue an action after having pleaded it as depending, or aſſign infancy for error when the party is adult, he ſhall be ſtruck off THE ROLL.

1. Sid. 84. 306. 1. Lev. 227. 298. 2. Lev. 118. 194. 1. Saund. 25. 2. Saund. 74. Ante, 23. 2. Danb. 156. Neſ. Lut. 91. 10. Mod. 228. 325. 2. Ld. Ray. 1014. 1. Barnes, 110. 3. Salk. 525. 1. Com. Dig. "Attorney" (B 14.). Cowp. 829.

The

Caſe 92.

The Caſe of Adrian Lampriere and Others.

THE KING is intitled to a *certiorari* as a matter of *right*; but if the appeal be made by a ſubject, it is matter of *diſcretion*.

S.C. 1. Vent. 63. 10. Mod. 205. 278. 12. Mod. 390. 403. 601. 645. 1. Ld. Ray. 216. 469. 580. 609. 2. Ld. Ray. 971. 1203. 1515. 2. Burr. 861. 4. Burr. 2456. Cowp. 78. 283. 2. Hawk. P.C. 407. Dougl. 419.

SERJEANT NEWDIGATE moved for a *certiorari* to remove an indictment hither from *Bedford*, againſt ſeveral Frenchmen for robbery.

KELYNGE, *Chief Juſtice*. Will it remove the recognizances there to appear?

TWISDEN, *Juſtice*. I never knew ſuch a motion made by any but the king's attorney or ſolicitor.

RAINSFORD, *Juſtice*. There is no indictment yet before a Judge of aſſize.

KELYNGE, *Chief Juſtice*. You may have a *certiorari*, but it muſt not be delivered till the indictment be found; and then the Judge hath the proſecutors there, and may bind them over hither, and ſo the trial may be here.

Caſe 93.

Anonymous.

In what caſes a *view* ſhall be granted.

KELYNGE, *Chief Juſtice*. A jury was never ordered to a *view* before their appearance, unleſs in an *aſſiſe*.—TWISDEN, *Juſtice*. Neither ſhall you have it here but by conſent *(a)*.

(*a*) But now by 4. Ann. c. 16. ſ. 9. "In any action brought at Weſtminſter, "where it ſhall appear neceſſary that "the jurors ſhould have a view of the "meſſuages, lands, or place in queſtion, "in order to their better underſtanding "the evidence, the Court may order a "ſpecial writ of *diſtringas* or *habeas* "*corpus* to iſſue, by which the ſheriff "ſhall be commanded to have ſix out "of the firſt twelve of the jurors named in ſuch writ; or ſome greater number of them, at the place in queſtion, "*ſome convenient time before the trial*, who "ſhall have the matters in queſtion ſhewn "to them, by two perſons in the ſaid "writ named, to be appointed by the "Court; and ſaid ſheriff ſhall, by a "ſpecial return certify, that the view "hath been had according to the command of the writ."

Caſe 94.

* Noſworthy *againſt* Wyldeman.

In *aſſumpſit* for money had and received by the defendant for the plaintiff *to the uſe of the defendant*, the Court, after verdict, will reject the latter words as repugnant.

S.C. 2. Keb. 615. 1. Roll. Abr. 111. pl. 4. Cro. Jac. 690. 10. Mod. 145. 185. 210. 230. 300. 8. Mod. 240. 12. Mod. 495. 510. 11. Mod. 48. 241. 273. 1. Ld. Ray. 669. 2. Ld. Ray. 1223. 1517. 1. Stra. 551. 2. Stra. 1011. Salk. 213. Dougl. 5. 667.

THE plaintiff declares in an *indebitatus aſſumpſit*, That the defendant was indebted to him in *fifty pounds* for ſo much money received of the plaintiff by one *Thomas Buckner*, by the appointment and to *the uſe* of the defendant.

After a verdict for the plaintiff—WINNINGTON moved in arreſt of judgment, that the plaintiff could not have an action for money received by the defendant to *the uſe* of the defendant.

But becauſe it might be money lent, which the defendant received to his own uſe, though he was to make good the value to the plaintiff, the Court will preſume after a verdict, that it appeared ſo to the jury at the trial. For where a declaration will bear two conſtructions, and one will make it good, and the other bad, the Court after a verdict will take it in the better ſenſe.—And accordingly the plaintiff had judgment.

Williams

Williams *againſt* Lee. Caſe 95

AN ACTION OF ACCOUNT.—It was prayed, that the Court would give further day for giving the account, the matter being referred to auditors.—TWISDEN, *Juſtice.* The auditors themſelves muſt give further day.—KELYNGE, *Chief Juſtice.* The auditors are judges whether there be a voluntary delay or not. If they find the parties remiſs and negligent, they muſt certify to the Court that they will not account.

On a *writ of account* the AUDITORS are the proper judges as to enlarging the time.

Poſt. 65.
2. Inſt. 380.

1. Brownl. 24. 1. Danv. 231. F. N. B. 116. Co. Lit. 90. 3. Bl. Com. 163. and ſee the ſtatutes Weſtm. 2. c. 11. and the 4. Ann. c. 16.

Roberts *againſt* Mariott. Caſe 96.

Trinity Term, 22. *Car.* 2. *Roll* 944.

MOVED to diſcontinue an action of debt upon a bond.—KELYNGE, *Chief Juſtice.* We will not favour conditions. RULED, that the other ſide ſhould ſhew cauſe why they ſhould not diſcontinue.

Leave to diſcontinue after judgment on demurrer.

S. C. poſt. 289.

S. C. 2. Keb. 614. 618. 702. S. C. 2. Saund. 73. 188. S. C. 1. Lev. 300. 333.

The bond in this caſe was conditioned for the performance of an award, *ita quòd* the award be ready to be delivered on the *feſt of May*. After *oyer*, and no award pleaded, the plaintiff in his replication, ſhewing the award and the breach thereof, miſtook the day, and averred, that the award was ready to be delivered on the *twentieth of May*. After demurrer, and judgment *niſi* for the plaintiff, the defendant ſhewed this miſtake. But the Court, on the prayer of the plaintiff, gave him leave to diſcontinue the action on payment of coſts. 2. Saund. 74. Sed vide S. C. poſt. 289.

* Buckly *againſt* Turner. Caſe 97.

ACTION UPON THE CASE upon a promiſe. The caſe was, That *Edward Turner*, brother to the defendant, was indebted to the plaintiff for a quarter's rent; and the defendant, in conſideration that the plaintiff *mitteret proſequi prædict. Edwardum Turner* (ſo the words are in the declaration), promiſed to pay the money (*a*).

A promiſe to pay the debt of another, in conſideration that the plaintiff, *mitteret proſequi*, is ſufficiently certain.

S. C. 1. Sid. 446. S. C. 2. Keb. 618. 624. Ante, 12, 13. Poſt. 166. 169. 284. 1. Ro. Abr. 24. 10. Mod. 296. 331. 1. Ld. Ray. 358. 368. 2. Ld. Ray. 735. 759. 1087. 1. Stra. 94. 592. 2. Stra. 933. 1027. Comyns, 115. 148. 1. Com. Dig. "Aſſumpſit" (A 3.).

After a verdict for the plaintiff it was moved in arreſt of judgment, that here is not any conſideration; for there is no loſs to the plaintiff in *ſending* to proſecute, &c. nor any benefit, but a diſadvantage to the party that owed the money: beſides, there is an uncertainty whether, or to whom he ſhould ſend.

TWISDEN. *Mittere proſequi* is well enough; for the plaintiff muſt be at charge in it.

KELYNGE, *Chief Juſtice.* Certainly it ought to have been *emitteret*; and if it be ſo in the Office-book we will mend it.

(*a*) See 29. Car. 2. c. 3.

TWISDEN

BUCKLY *againſt* TURNER.

TWISDEN, *Juſtice.* This being after a verdict, if you mend it, they muſt have a new trial; for then it becomes another promiſe.

JONES moved for judgment, and ſaid he found the word *mitto* did ſignify to *ſend*, *forbear*, *ceaſe*, or *let alone*; as *mitte me quæſo*, "I pray let me alone," in TERENCE: and in the Latin and Engliſh dictionary it hath the ſenſe of forbearing.

KELYNGE, *Chief Juſtice.* I think the conſideration not good, unleſs the word *mitto* will admit of that ſenſe: if it have a propriety of ſenſe to ſignify *forbear*, in reference to things as well as perſons, it will be well. Whereupon the dictionary being brought, it was found to bear that ſenſe. And TWISDEN, *Juſtice*, ſaid, If a word will bear divers ſenſes, the beſt ought to be taken after a verdict.—PER CURIAM, Let the plaintiff take his judgment.

Caſe 98. Richards *againſt* Hodges.

Trinity Term, 21. *Car.* 2. *Roll* 882.

To debt on bond to ſave harmleſs, and *non damnificatus* pleaded, if the plaintiff ſtate the payment in damage, and the defendant rejoins that he tendered the money, and that the plaintiff paid it *de injuriâ ſuâ propriâ*, it is A DEPARTURE.

DEBT upon a bond. The condition was to ſave a pariſh harmleſs from the charge of a baſtard-child. The defendant pleaded "*non damnificatus.*" The plaintiff replies, that the pariſh laid out three ſhillings for keeping the child. The defendant rejoins, that he tendered the money; and the plaintiff paid it *de injuriâ ſuâ propriâ:* whereupon it * was demurred.

The queſtion was, Whether this rejoinder were a departure or no from the bar?

SAUNDERS. It is a good rejoinder; for in our bar we ſay, that the pariſh is not damnified, that is, not damnified within the intent of the condition. If I am to ſave a man harmleſs, and he will voluntarily run himſelf into trouble, the condition of my bond is not broken: and ſo our rejoinder is purſuant to our bar, and ſhows, that there is no ſuch damnification as can charge us.

* [44]

S. C. 2. Saund. 83. S.C. 1. Sid. 444. S. C. 2. Keb. 612. 619. Comyns, 553. 1. Saund. 116. 1. Wilſ. 334. Stra. 422. 1. H. Bl. Rep. 253. Co. Litt. 304. a. 2. Ld. Ray. 1449.

TWISDEN, *Juſtice.* The rejoinder is a *departure*: as in an action of covenant for payment of rent, if the defendant pleads performance, and the plaintiff reply, that the rent is unpaid; for the defendant to rejoin that it was never demanded is a departure. You ſhould have pleaded thus, *viz.* that *non fuit damnificat.* till ſuch a time, and that then you offered to take care of the child, and tendered, &c.—Judgment for the plaintiff, *niſi*, &c.

12. Mod. 54. 92. 10. Mod. 251. 257. 349. 1. Ld. Ray. 30. 76. 234. 693. See Mr. Conſt's edit. of Bott's Poor Laws, 1ſt vol. page 403.

Caſe 99. Smith, Lluellyn, and Others Commiſſioners of Sewers.

An *attachment* lies againſt commiſſioners of ſewers for impoſing a fine after a *certiorari* delivered.

THEY were brought into court by *attachment*, becauſe they proceeded to fine a perſon after a *certiorari* delivered.—S. C. 1. Lev. 288. S. C. 1. Vent. 66. S. C. 2. Keb. 635. S. C. Raym. 186. 1. Sid. 78. 1. Salk. 201. Cro. Eliz. 915. Cro. Jac. 336. 2. Mod. 334. 5. Mod. 314. 2. Hawk. P. C. 229. Bunb. 61. Stra. 1263.

TWISDEN,

SMITH, LLUELLYN, AND OTHERS, COMMISSIONERS OF SEWERS.

TWISDEN, *Juſtice.* *Sir Anthony Mildmay* was a commiſſioner of ſewers, and for not obeying a *certiorari* was indicted of a *præmunire*, and was fain to get the king's pardon (*a*). And I have known, that upon an unmannerly receipt of a prohibition, they have been bound to the good behaviour.

KELYNGE, *Chief Juſtice.* When there are informations exhibited againſt you, and you are fined a thouſand pounds, a man which is leſs than it was in king *Edward the Third*'s time (for then a thouſand pound was a great deal more than it is now), you will find what it is to diſobey the king's writ.

Afterwards they appeared again, and COLEMAN ſaid, the firſt writ was only to remove preſentments; the ſecond to remove orders; and we have made two returns, the one of preſentments, the other of orders: a general writ might have had a general return.

The 13. *Eliz.* c. 9. which makes the orders of commiſſioners of ſewers binding without the *royal aſſent*, and enacts, that they ſhall not be reverſed but by other commiſſioners, doth not thereby reſtrain the Court of King's Bench, or ouſt it of its general juriſdiction over *inferior courts.*

KELYNGE, *Chief Juſtice.* Before you file the return, let a clauſe of the ſtatute of 13. *Eliz.* c. 9. be read; which being done, he ſaid, that by the ſtatute of 23. * *Hen.* 8. c. 5. (*b*) no orders of the commiſſioners of ſewers are binding without the royal aſſent: now this ſtatute makes them binding without it, and enacts, "that they ſhall not be reverſed but by other commiſſioners." Yet it never was doubted, but that this Court might queſtion the legality of their orders notwithſtanding; and you cannot ouſt the juriſdiction of this Court without particular words in acts of parliament. There is no juriſdiction that is uncontroulable by this Court. Sir *Henry Hungate's Caſe* (*c*) was a famous caſe, and we know what was done in it.

* [45]

MORETON, *Juſtice.* Since the making this ſtatute of queen *Elizabeth*, thoſe caſes in *Coke's Reports* have been adjudged concerning *Cheſter Mills* (*d*). If commiſſioners exceed their juriſdiction, where are ſuch matters to be reformed but in this court? If any court in England of an inferior juriſdiction exceed their bounds, we can grant a prohibition.

11. Co. 64. 5. Co. 103. Moor, 641. Bridg. 63, 64. 10. Mod. 48. 54. 60. 187, 349. 2. Hawk. P. C. 9. Strange, 302. 2. Burr. 1048.

TWISDEN, *Juſtice.* I have known it ruled in 23. *Car.* 1. that the ſtatute of 13. *Eliz.* c. 9. where it is ſaid, "there ſhall be no "*ſuperſedeas*, *&c.*" hath no reference to this caſe but only to the chancery; but this is a *certiorari* whereby the king doth command the cauſe to be removed, *et voluit* that it be determined here, and no where elſe.

THE COURT fined them for not obeying two *certiorari's*, but fining them that brought them five pounds a-piece.

(*a*) Hetley v. Sir John Boyer, Sir Anthony Mildmay, and Others, Cro. Jac. 336.

(*b*) See alſo 3. Jac. 1. c. 14. and 7. Ann. c. 10.

(*c*) Cro. Eliz. 885.

(*d*) 10. Co. 138. 4. Inſt. 275.

Anonymous

Caſe 100.

Anonymous.

Bankrupts.
10. Mod. 20.
12. Mod. 446.
11. Mod. 223.
2. Vern. 293. 706.
Abr. Eq. 55.
1. Peer. Wms. 238. 682.
2. Peer. Wms. 500.

JONES moved, that one who was partner with his brother, a bankrupt, being arreſted, might be ordered to put in bail for the bankrupt as well as for himſelf.—TWISDEN, *Juſtice*. If there are two partners and one break, you ſhall not charge the other with the whole, becauſe it is *ex maleficio*; but if there are two partners and one of them die, the ſurvivor ſhall be charged for the whole. In this caſe you have admitted him no partner by ſwearing him before the commiſſioners of bankrupts.—So the motion was not granted.

3. Peer. Wms. 23. 182. 405. 408. 2. Stra. 995. 1157. 2. Ld. Ray. 871. 2. Ch. Caſ. 139. Cowp. 449. Dougl. 627. And ſee Cooke's Bankrupt Laws, 2d edit. p. 550 to 557.

* [46]

Caſe 101.

* Rawlins' Caſe.

A judgment, though acknowledged in the name of another, ſhall not be ſet aſide in a ſummary way until the offender be convicted.
Hawk. 179.
2. Jones, 64.
1. Vent. 301.
3. Cro. 531.
Cro. Car. 256.
Cro. Jac. 256.

SCROGGS, *Serjeant*, moved, that *Rawlins* having perſonated one *Spicer* in acknowledging a judgment, that therefore the judgment might be ſet aſide.

TWISDEN, *Chief Juſtice*. The ſtatute 21. *Jac.* 1. c. 26. §. 2. that makes it felony, does not provide that the judgment ſhall be vacated. One *Tymberly* (*a*) eſcaped with his life very narrowly, for he had perſonated another in giving bail, but the bail was not *filed*.

SCROGGS, *Serjeant*, then moved, that the defendant had paid the fees of the execution, which the plaintiff ought to have done.—So the Court granted an attachment againſt the bailiff.

1. Hale, 696. Strange, 384.

(*a*) Adjudged, after argument on a ſpecial verdict, that it was not within the ſtatute, becauſe the bail was not filed, but the priſoner was indicted for the *miſdemeanor*. 2. Sid. 90. See 1. Hale, 696. Strange, 384. But the ſtatute 21. Jac. 1. c. 26. extending only to proceedings *in court*, it is by 4. Will. & Mary, c. 4. alſo made felony to perſonate any other perſon *as bail*, before any judge of aſſize, or other commiſſioner authoriſed to take bail in the country. 4. Bl. Com. 128.

Caſe 102.

Taylor *againſt* Wells.

Trinity Term, 21. *Car.* 2. *Roll* 502.

Trover for "*ten pair of* "*curtains and* "*valons*," is bad, for *uncertainty*, though after verdict.
S. C. 2. Saund. 74.

TROVER AND CONVERSION for *decem parium tegularum et valorum*," ANGLICE, of "ten pair of curtains and valons."

OBJECTION in arreſt of judgment, That it is not certain what is meant by "*a pair*," whether ſo many *two's* or ſo many *ſets*; and that in *Web v. Waſhburn* (*a*) "four pair of hangings" was held not good.

S. C. 1. Sid. 445. S. C. 2. Keb. 623. 640. S. C. 1. Vent. 71. Poſt. 289. 1. Keb. 390. 1. Vent. 106. 114. 3. Keb. 253. 2. Show. 315. 11. Mod. 66. 12. Mod. 3. Ld. Ray. 991. 2. Stra. 738. 809.

(*a*) Styles, 352.

TWISDEN,

TAYLOR *againſt* WELLS.

TWISDEN, *Juſtice*. I remember that "a pair of hangings" has been held naught. Trover and converſion "*pro decem ovibus* "*et agnis*," not expreſſing how many *ewes* and how many *lambs*, ruled naught: another action of trover "*de velis*," not ſaying how many, held to be naught.

SAUNDERS urged, on the other ſide, that "ten pair of curtains "and valons" is certain enough; for by "pair" ſhall be underſtood *two*, and ſo there are twenty in all: if it be objected, that it does not appear how many of each, I anſwer, the words "ten "pair" ſhall go to both: beſides, it is after verdict, and therefore ought to be made good, if by any reaſonable conſtruction it may. If it had been *ten ſets* or *ten ſuits*, then without queſtion it had been well enough: now why may not *a pair* be underſtood of *ſets* or *ſuits*, or ſo many as will ſerve for a bed, if it ſhall not be taken for *a couple*? They quoted ſome caſes in which it had been adjudged, that in trover and converſion for ſeveral things, though it did not appear how many of each ſort there were, yet it had been held good.

TWISDEN, *Juſtice*, acknowledged, that there * had been ſuch reſolutions; but ſaid, that he knew not what to think of ſuch caſes, conſidering the uncertainty of the declarations. Now the word "*pair*" in the preſent caſe is as uncertain as may be, though a "pair of gloves,"—"a pair of cards,"—"a pair of tongs," is certain; for the word applied to ſome things ſignifies more, to others leſs; and what ſhall it ſignify here?

* [47]

But by THREE JUDGES, *viz.* KELYNGE, *Chief Juſtice*, RAINSFORD and MORETON, *Juſtices*, who ſeverally delivered their opinions againſt TWISDEN, the plaintiff had judgment.

FOXWIST and Others, Executors of Pinſent, *againſt* Tremain. Caſe 103

Trinity Term, 21. *Car.* 2. *Roll* 1512.

ASSUMPSIT. The plaintiffs being executors, and two of them under the age of ſeventeen years, they all appeared by *attorney*. The defendant thereupon pleaded *in abatement*, and the plaintiffs demurred.

If there be ſeveral executors they may all ſue jointly by *attorney*, though ſome of them are *infants* under ſeventeen years of age. S. C. poſt. 72. 296. S.C. Raym. 198. S.C. 1. Sid. 449. S. C. 2. Saund. 212. S.C. 1. Vent. 102. S.C. 2. Keb. 537. 1. Lev. 181.

FIRST, An infant cannot make a warrant of attorney.

SECONDLY, An infant appearing by *attorney* may be amerced *pro falſo clamore*: and the reaſon is, becauſe it does not appear that he is under age; but if he appear by *guardian* or *prochein ami*, he ſhall not be amerced.

THIRDLY, the infant may be much prejudiced.

For theſe reaſons, and becauſe they ſaid the practice had gone accordingly, judgment was ſtayed.

625. 633. 691. S. C. 1. Lev. 299. 1. Show. 168. 1. Roll. Abr. 288. 1. Keb. 750. Cro. Eliz. 378. 2. Roll. 207. Cro. Jac. 303. 2. Saund. 213.

FOXWIST AND OTHERS *againſt* TREMAIN.

The caſes cited *pro* and *con* were, *Cro. Eliz.* 424. *Cro. Jac.* 441. 1. *Roll* 288. and *Hutton v. Maſcall* (*a*), where a *ſcire facias* brought by two executors, reciting that there was a third, but within age, it was reſolved that all muſt join; and *Colt v. Sherwood* (*b*), where it was reſolved, that an infant executor cannot defend by attorney.

(*a*) 2. Saund. 212.

(*b*) Cited poſt. 298.

TWISDEN, *Juſtice.* Where there are ſeveral executors, and one or more under age, and the reſt of full age, all muſt join in an action; and adminiſtration *durante minore ætate* cannot be granted, if any of them be of full age (*c*).

(*c*) See this caſe moved again in Mich. Term, 22. Car. 2. and a *reſpondeat ouſter* awarded in Trinity Term, 29. Car. 2. poſt. p. 72. and 296. See alſo 21. Jac. 1. c. 13. and 4. Ann. c. 16.

Caſe 104. Haſpurt *againſt* Wills.

A cuſtom that all ſhips *paſſing by* a certain wharf ſhall pay ſuch a duty is a bad cuſtom; for this being *toll thorough* cannot be claimed without ſhewing a conſideration.

ERROR on a judgment in the common pleas. A ſpecial action was brought upon the cuſtom of *wharfage* and *craneage* in the city of *Norwich*: the declaration ſets forth, that they have a common wharf, and a crane to it; and then they ſet forth a cuſtom, that all goods brought down the river, and paſſing by, ſhall pay ſuch a duty.

COLEMAN objected, that the cuſtom is not good, for that it is * "*toll-thorough*;" which is *malum tolnetum.*

* [48]

TWISDEN, *Juſtice.* There is a caſe in *Hob.* 175. of a bad cuſtom of paying the charges of a funeral, though the plaintiff were a ſtranger, and not buried in the pariſh. So here, if they had unladed at the key, they ſhould have paid the whole duty; nay, if they had unladed at any other place in the city, there would have been ſome reaſon for it; or if the declaration had ſet forth, that they had cleanſed the river. * At *Graveſend* they claimed a toll of boats lying in the river of *Thames*; and it was adjudged in Parliament to be *malum tolnetum.*

S. C. 1. Vent. 71. S. C. 1. Sid. 434. S. C. 2. Keb. 614. 665.

The judgment was reverſed.

Cro. Eliz. 711. Poſt. 104. 232. Jones, 162. Moor, 575. 2. Mod. 143. 4. Mod. 320. 2. Roll. Abr. 522. 1. Sid. 284. 2. Sid. 178. 6. Mod. 123. 1. Lev. 14. 3. Lev. 400. Poſt. 231, 232. 3. Lev. 425. 400. 2. Roll. Abr. 522. 1. Roll. Abr. 547. Will. 63. 296. Stra. 1224. 3. Burr. 1402. 2. Will. 298. Dougl. 119. 201. 218. 616. See the caſe of Colton v. Smith, Cowper, 47. and Ld. Pelham v. Pickerſgil, 1. Term Rep. 660.

Caſe 105. Heſkett *againſt* Lee.

Eaſter Term, 22. Car. 2. Roll 408.

A common recovery ſuffered by an *infant* under a PRIVY SEAL is not erroneous, although on the record the *guardian* be admitted "*ad ſequendum,*" and his appearance entered *in propriâ perſonâ ſuâ*; for the guardian does *follow the ſuit* of the infant in *his own perſon.*

A WRIT OF ERROR was brought to reverſe a judgment given in a common recovery in the county palatine of Lancaſter.

—S. C. 2. Saund. 94. S. C. 1. Sid. 446. S. C. 2. Keb. 627. S. C. 1. Vent. 73. S. C. 2. Danv. 772. Poſt. 246. 252. 1. Sid. 321. 118. 252. 446. Cro. Eliz. 323. 1. Lev. 242. 163. Godb. 161. Cro. Jac. 641. Cro. Car. 307. 1. Roll. Abr. 731. Hob. 196. 1. Jones, 318. Stiles, 246. Fitzg. 114. 12. Mod. 1. Gilb. Eq. Rep. 16. 8. Mod. 25. 9. Mod. 103. 153.

WESTON.

HESKETT *against* LEE.

WESTON. The tenant in the common recovery is *an infant*, and appears by his *guardian*. But there is a fault in the admittance; for he ought to have been admitted as defendant in this form: "SCILICET, *A.B. admittitur per C. D. gardianum ſuum ad comparendum et defendendum*;" whereas he is admitted in the record "*ad ſequendum*."—THE SECOND ERROR is in the appearance; which is entered in this manner: SCILICET, *qui admiſſus eſt ad ſequendum*, &c." (following the error of the admittance) "*ut gardianus ipſius* THOMÆ *in propriâ perſonâ ſuâ venit et defendit*, &c." ſo that he is admitted "*ad ſequendum*," which is the act of the plaintiff; and as guardian he defends, which is the act of the defendant: and further, it is ſaid, that the guardian appears *in propriâ perſonâ*, which cannot be. Now I conceive that the aſſignment of the guardian, and the appearance of the guardian, is triable by the record: and if the infant ſhould bring an action againſt his guardian, he muſt declare that he was admitted to appear and defend his right. Now, Whether will this admittance *ad ſequendum* warrant ſuch a declaration? I conceive it will not, and that therefore the recovery is erroneous.

WINNINGTON. I am for them that claim under the recovery. And I conceive this whole record is not only good in ſubſtance, but according to the form uſed in all common recoveries. If an infant tenant appear *by guardian*, either as defendant or vouchee, he ſhall be bound, as well as one of full age. * And if the guardian *faint-pleads* or *miſpleads*, the infant hath an action againſt him: 9. *Edw.* 4. *pl.* 34, 35. *Dyer* 104. b. In our caſe there is a common recovery, wherein the tenant is *an infant*, who ought to appear by his guardian: Whether the admittance of him here by his guardian, be well entered or no, is the queſtion? The word "*ſequi*" ſignifies only to *follow* the cauſe; and the defendant doth proſecute and act: a *venire*, by proviſo, may be taken out at the defendant's ſuit: 35. *Hen.* 8. *pl.* 7. So in a replevin the defendant is the proſecutor; and the tenant doth ſue in common recovery, and is the only perſon that doth proſecute an act; ſo that I think the word is proper. It is true, one book is cited, where "*proſequendum*" is void in an ejectment: *Cro. Jac.* 640, 641. *Sympſon's Caſe*; but that judgment is upon the point of *prochein amy*. There is a precedent for me in 6. *Car.* 1. which I believe was the precedent of this caſe. And *Sir Francis Engleſield's Caſe*, where the infant came in as vouchee, is the ſame with ours. As for the ſecond error aſſigned, *viz.* that the guardian is ſaid to come *in propriâ perſonâ*; in the *Earl of Newport's Caſe*, and in *Engleſield's Caſe*, "*propriâ perſonâ*" is in the ſame manner as here. Now the law doth not regard ſo much the manner of the admittance, as that a good guardian be admitted.

* [89]

Ld. Ray. 113. 232. 600. 1. Vern. 461. 1. Eq. Abr. 283. 1. Stra. 445. 2. Stra. 1076. 1. Peer. Wms. 536. 2. Peer. Wms. 119. 244. 297. 387. 519. 549. (643.) 3. Peer. Wms. 206. 235. Cruiſe on Recov. 148. 2. Bac. Abr. 553. 3. Bac. Abr. 150. Sheph. Touch. 49, 50. Cowp. 349.

TWISDEN, *Juſtice*. This is a recovery ſuffered upon a privy-ſeal from the king (*a*), and upon a marriage ſettlement upon good

(*a*) See Hob. 196.

HEWETT *againſt* LEE.

conſideration; and therefore ought to be favoured. The word "*ſequatur*" is as proper for the defendant as for the plaintiff. And for the ſecond, the words "*propriâ perſonâ*" are well enough, being applied to the guardian, who does in proper perſon appear for the infant. For an infant to ſuffer a common recovery, if it were *res integra*, it would hardly be admitted. But if an infant will reverſe a common recovery, he ought to do it whilſt he is under age, as it was adjudged here about two years ago, according to my LORD COKE's opinion.

An *infant* cannot reverſe a recovery after his full age.

WESTON. If you ſtand upon that, Whether an infant, having ſuffered a common recovery, may reverſe it after he is of full age? I deſire to be heard to it.—*Cur. adviſare vult (a).*

Co. Lit. 380. b. Cro. Car. 307. Recov. 148. 1. Sid. 321. 1. Lev. 142. Pigot, 64. 166. Hob. 196. W. Jones, 318. Salk. 567. Ld. Ray. 113. 2. Bac. Abr. 504. 3. Bac. Abr. 136. Cruiſe on

(*a*) The Court affirmed the recovery. S. C. 1. Vent. 74. S. C. 2. Saund. 94. S. C. 1. Sid. 446.

*[50]

Caſe 106.

* Tildell *againſt* Walter.

Woad is ſmall tithes, and by cuſtom may be payable to *the parſon* inſtead of *the vicar*.

A VICAR libelled in the ſpiritual court for tithe of *woad*. BARRELL prayed a prohibition, ſuggeſting, that time out of mind they paid no *ſmall tithe* to the *vicar*; but that ſmall tithes, by the cuſtom of the pariſh, were paid to the *parſon*.—TWISDEN, *Juſtice*. If the endowment of the vicarage be loſt, ſmall tithes muſt be paid according to preſcription.

9. C. 1. Keb. 628. S. C. 1. Sid. 447. S. C. 1. Vent. 75. S. P. 1. Vent. 61. S. P. Hutton, 77, 78. Poſt. 216. 2. Peer. Wms. 522.

See 2. Edw. 6. c. 13.

Caſe 107.

Jordan *againſt* Fawcett.

In debt againſt an executor A PLEA of judgment recovered, and no aſſets *ultra*, without alledging in what court, and *the time* when, is bad on *general demurrer*.

ERROR of a judgment in the common pleas. An action of debt was brought in the common pleas againſt an executor, who pleaded ſeveral judgments; but for the laſt judgment that he pleads, he doth not expreſs *where* it was entered, nor *when* obtained; to which plea the plaintiff demurred and had judgment.—COLEMAN held it well enough upon a general demurrer.—TWISDEN, *Juſtice*. It is not good, for by this plea the plaintiff is tied up to plead nothing but "*nul tiel record.*" He might, if the judgment had been pleaded as it ought to have been, have pleaded perhaps "*obtent. per fraudem.*"—The judgment was accordingly affirmed.

S. C. 1. Sid. 449. S. C. 1. Vent. 76. S. C. 2. Keb. 632.

Barnaby

Barnaby Love *againſt* Wyndham.

Caſe 108.

Trinity Term, 21. Car. 2. Roll 1605.

If a term be deviſed to *A.* for life, with remainder to *B.* for life, and if *B.* die *without iſſue of his body begotten*, then to *C.* the limitation over to *C.* is too remote to take effect.

S. C. 1. Eq. Ab. 191.

UPON an iſſue out of chancery the jury find a ſpecial verdict, *viz.* That one *Gilbert Thirle* was ſeiſed of the lands in queſtion for *three lives*, and demiſed the ſame to *Nicholas Love* the father, for *a term of years*, if the *ceſtui que vies*, or any of them, ſhould ſo long live: that he being ſo poſſeſſed made his will, and deviſed them in this manner; *viz.* to his wife for her life; and after her deceaſe to *Nicholas* his ſon for his life; and if *Nicholas* his ſon ſhould die without iſſue of his body begotten, then he deviſeth them to *Barnaby* the plaintiff. Then they find, that the wife was executrix, and that ſhe did agree to this deviſe.

And, Whether this be a good limitation to *Barnaby* or not? is the queſtion.

JONES. I conceive it is a good limitation to * *Barnaby*. I ſhall enquire FIRST, Whether a termor having deviſed to one for life, and after his death to another for life, may go any further? and SECONDLY, admitting that he may go further, Whether the limitation in our caſe, which is to begin after the death of the ſecond, without iſſue of his body, be good or no?

* [51]

S. C. 1. Lev. 290. S. C. 2. Keb. 637. S. C. 1. Vent. 79. S. C. 1. Sid. 450. S. C. 2. Chan. Rep. 14. Poſt. 114. 1. Roll. Abr. 610. pl. 7. Palm. 50. Pollex. 29. 10. Co. 87. 1. Sid. 37. 1. Lev. 25. 290. 3. Lev. 22. 10. Mod. 402. 419. 501. 12. Mod. 44. 52. 278. 283. 592. 9. Mod. 28. 93. 101. 124. Fitzg. 314. 321. 1. Vern. 234. 304. 462. 2. Vern. 23. 38. 86. 151. 195. 362. 600. 758. 766. Prec. in Ch. 323. 421. Abr. Eq. 191. Ca. Tem. Talb. 21. 1. Peer. Wms. 1. 98. 432. 534. 2. Peer. Wms. 608. 618. 622. 686. 3. Peer. Wms. 29. 113. 300. See 2. Danv. 523. pl. 6. 1. Lev. 25. 290. 1. Sid. 37. 3. Lev. 22, 23.

For THE FIRST POINT he ſaid, the reaſon given in *Plowden* (*a*) and in *Coke* (*b*) why an executory deviſe of *a term* is good in law, is, Becauſe the law takes it as deviſed to the laſt man firſt, and then afterwards to the firſt man, without which tranſpoſition it is not good; for if it ſhould be a deviſe to the firſt man firſt, there would be nothing left for the laſt but *a poſſibility*, which is not grantable over (*c*). Now then, if a man may deviſe a term after the death of another, then he may deviſe it after the death of two others. It is true, this cannot be in grants, for they are founded upon contracts, and there muſt be a certainty in them, according to the rector of *Chedington's Caſe* (*d*). Now, if a deviſe may be good after the death of one or two, it is all one if it be limited after the death of five or ſix. Now that a contingency may be deviſed upon a contingency, I take it that the authorities are clear: in the caſe of *Cotton v. Herle* (*e*) it was ſo reſolved by three Juſtices; and alſo in the caſe of *Rethorick v. Chappel* (*f*). As for the caſe of *Child v. Bayly* (*g*) I conceive it is not againſt our caſe, for

(*a*) Plowd. Comm. 519.

(*b*) 8. Co. 94.

(*c*) But ſee 2. Burr. 1131. 1. Bl. Rep. 251. 3. Peer. Wms. 132. 1. Stra. 132. 1. Vezey, 411.; and Jones v. Roe, 1. H. Bl. Rep. C. B. 30. that a poſſibility coupled with an intereſt is deviſable. S. C. confirmed in B. R. on a writ of error, 3. Term Rep. 88.

(*d*) 1. Co. 156. See alſo Lord Stafford's Caſe, 8. Co. 73.

(*e*) 1. Roll. 612.

(*f*) Hilary Term, 9. Jac. 1. 2. Bulſt. 28. Godolph. 149.

(*g*) Cro. Jac. 459. 1. Roll. Abr. 613. 1. Eq. Caſ. Ab. 192. 2. Roll. Rep. 129. Palm. 48. 333.

Love against Wyndham.

they held the deviſe to be void, not becauſe it was a contingency upon a contingency, but in reſpect of the remoteneſs of the poſſibility, and becauſe the term was wholly deviſed to a man and his aſſigns; ſo that by the expreſs authority of the two firſt caſes, and by the implication of this caſe, I do think that a deviſe to a man after ſuch a manner is good, provided that it do not introduce *a perpetuity*: ſo that where there is not the inconvenience of a perpetuity, though there are many contingencies, they are no impediment to the deviſe. Therefore where a deviſe is upon a contingency that may happen upon the expiration of one or more men's lives, and where it is upon a contingency that may endure for ever, there is a great difference. The reaſon of the rector of *Chedington's Caſe* was becauſe of the uncertainty, for in caſe of *a grant* of a term there is a great uncertainty; but ours is in caſe of *a deviſe*, which is not taken in the law by way of remainder (*a*); ſo that I conceive a contingency may be limited * upon a contingency, provided that it be not remote.

* [52]

THE SECOND POINT is, Whether this deviſe, thus limited, be a good deviſe? Now I conceive the limitation is as good as if it had been to his wife for her life, and after her death to *Nicholas* for life, and after his death to *Barnaby*. I agree, that if theſe words "if *Nicholas* die without heirs of his body" ſhall not be applied to the time of his death, it will be a void deviſe: but the meaning is, that if at the time of his death he ſhall have no iſſue, then, &c. Now that they muſt have ſuch conſtruction I prove from the words of the will. The limitation of the remainder muſt be taken ſo as to quadrate with the particular eſtate; as if there be a conveyance to one for life, and if he die without iſſue to another; this is a good remainder upon condition, and the remainder ſhall reſt upon the determination of the particular eſtate, if the tenant for life have no iſſue when he dieth: but if a man convey to one, and the heirs of his body, and if he die without iſſue, to another, there it muſt be underſtood of a failure of iſſue at any time, becauſe the precedent limitation goes further than his life. But admitting there were no precedent words to guide the intention, and that common parlance were againſt me, yet if there be but a poſſibility of a good conſtruction, it ſhall be ſo conſtrued; and they may very well be underſtood of his dying without iſſue of his body at the time of his death. In the caſe of *Goodyer v. Clerk* in this court (*b*) I confeſs it was adjudged, that it would be underſtood of a failure of iſſue at any time; but in our caſe, if you ſhall not underſtand it of a failure of iſſue at the time of his death, it cannot have any conſtruction at all to take effect. I think there are no expreſs authorities againſt me; thoſe that may ſeem to be ſo I will put, and endeavour to give an anſwer to them. As for the caſe of *Child v. Bayly*, reports differ upon the reaſon of that judgment;

(*a*) 12. Aſſ. pl. 5. (*b*) Trinity Term, 12. Car. 1. Roll 1048. 1. Lev. 35.

for

for CROKE ſays (*a*), it was held to be a void deviſe, becauſe it was taken if he die without iſſue at any time during the term: but SERJEANT ROLLE (*b*) goes upon another reaſon; for he ſays, it is void becauſe given abſolutely to the ſon and his aſſigns before. In the caſe of *Leventhorp v. Aſhly* (*c*), the remainder * there is ſaid to be void, becauſe when he had deviſed the term to *A.* and the heirs males of his body, it ſhall go to the executors of *A.* and the remainder there was to begin upon his dying without iſſue at any time. The caſe of *Saunders v. Corniſh* (*d*) will not come to ours; for there were many limitations for life ſucceſſively to perſons not in being, &c. In the caſe cited in the Firſt Report (*e*), of an eſtate for life limited to one, and to every heir ſucceſſively an eſtate for life, the limitation was naught, becauſe it would make a perpetual freehold; and nobody would know where the abſolute eſtate ſhould veſt.—So he prayed judgment for the plaintiff.

* [53]

COLEMAN *for the defendant.* I conceive this to be a void limitation. MR. JONES would make this a middle caſe. I ſhall diſcharge him of the firſt point, though he has taken pains to argue it: and I ſhall reſt upon this, that the limitation of *a term* after the death of a man without iſſue of his body, is void. The caſe is put as a middle caſe to theſe two, *viz.* If a man poſſeſſed of a leaſe for years, deviſe it to *J. S.* for life; the remainder to *J. N.* for life, the remainder to *J. G.* for life; theſe remainders are good. But if he deviſe to *J. S.* and the heirs of his body, the remainder over, this remainder he admits to be void, becauſe it depends upon ſo remote a poſſibility as may never happen. Now I conceive it is the ſame thing to limit it to one for life, and if he die without iſſue, then to another for life, as to limit it to one and the heirs of his body, with a remainder over. He would tie it up from the ordinary and legal conſtruction, *viz.* to iſſue at the time of his death. If it be to be underſtood of dying without iſſue at any time, then *Child v. Bayly* (*f*), and *Corniſh's Caſe* (*g*) are full authorities in the point. There a leſſee for years deviſeth to one for life, and after to *Williams*, and his aſſigns, and if he die without iſſue *then living*, the remainder to *J. G.*; this they ſay is good in caſe of a fee-ſimple, but they will not allow it in caſe of a term for years. Now MR. JONES would by conſtruction bring the words "then living" into our caſe. The legal conſtruction of the words "dying without iſſue" is, if there be a failure of iſſue at any time * to come. In the caſe of *Pell v. Brown* (*h*), if the words "then living" had not been in the will, the caſe had not been ſo adjudged.

* [54]

KELYNGE, *Chief Juſtice.* You go up hill a little. Can *Barnaby* take ſo long as there is any iſſue in being of *Nicholas*?

(*a*) Cro. Jac. 462.
(*b*) 1. Roll. Abr. 613.
(*c*) 1. Roll. Abr. 611.
(*d*) 1. Roll. Abr. 612. 614.
(*e*) 1. Co. 135.
(*f*) Cro. Jac. 459.
(*g*) 1. Roll. Abr. 612. 614.
(*h*) 3. Lev. 22. 432.

LOVE against WYNDHAM.

JONES, He cannot.

KELYNGE, *Chief Juſtice.* Then *Barnaby*'s intereſt depends upon a contingency that may never happen.

JONES. I grant, if *Nicholas* hath iſſue at the time of his death, that *Barnaby* ſhall never take, but if he hath none he ſhall.

KELYNGE, *Chief Juſtice.* If I deviſe lands to *A.* for life, and if he die without iſſue of his body, to *B.* *A.* ſhall have an eſtate-tail. So in this caſe the words and limitation are the ſame, though, the deviſor having but a leaſe for years, there cannot be an eſtate-tail of it *(a)*: yet he intended not that *Barnaby* ſhould have an eſtate as long as there were any iſſue in being of *Nicholas*'s body.

TWISDEN, *Juſtice.* It appears to me, upon the reaſon of the caſes that have been cited, that the remainder to *Barnaby* muſt be void, becauſe of the remote poſſibility.

If a tenant of a term deviſe it to *B.* for life, the remainder to *C.* for life, the remainder to *D.* for life; I have heard it queſtioned, Whether theſe remainders are good or not? But it hath been held, that if all the remainder-men are living at the time of the deviſe, it is good: if all the candles be light at once it is good. But if you limit a remainder to a perſon not in being, as to the firſt-begotten ſon, &c. and the like, there would be no end if ſuch limitations were admitted, and therefore they are void; and ſome Judges are of the ſame opinion to this hour.

If a term be deviſed to *A.* for life, with a void remainder over, and *A.* die before the term expires; *Quære*, If it ſhall go to the perſonal repreſentative of the deviſor or deviſee?

BUT then there will be a queſtion, To whom the remainder of the term will go, if *Nicholas* die without iſſue? Whether to the executors of *Nicholas*, or to the executors of *Dr. Love?*

If I deviſe a term to *A.* for life; after the death of *A.* his executors ſhall not have it, but it ſhall go to the executors of the deviſor: but if it be deviſed to *A.* generally, without ſaying "for life," it ſhall go to his executors after his death. But a deviſe for life veſts in him only during his life, and you may make a limitation over.—KELYNGE, *Chief Juſtice.* I take it, that *A.* carries the whole term, when deviſed to him for life; becauſe an eſtate for life is larger than the longeſt term.—TWISDEN, *Juſtice.* * As a term for years doth admit of *remainders*, ſo it doth of *reverſions*, if you will have it ſo; and when he deviſeth to *A.* during his life, *A.* ſhall have it for his life; but the reverſion ſhall be to the deviſor's executors. But if he deviſe it to *A.*, for life, and if he die without iſſue of his body, the remainder to *B.* what ſhall become of the reverſion then?—KELYNGE, *Chief Juſtice.* You ſtart a new point.

* [55]

Poſt. 115.
1. Sid. 451.
1. Roll. Abr. 612.
7. Co. 23.
2. Sid. 37.

(a) See Mr. Hargrave's edition of Co. Lit. 20. a. note (5).

THE

THE COURT. You ſhall have our judgments this Term (*a*).

Love *againſt* WYNDHAM.

(*a*) The whole Court were unanimouſly of opinion, that the *remainder* to *Barnaby* was void. S. C. 1. Lev. 290. for that as he could not take until the death of *Nicholas* without iſſue, it was the ſame in effect as if it had been to *Nicholas* and the heirs of his body, with remainder to *Barnaby*; which deviſe would have been clearly bad, becauſe after *a term* is deviſed to one, and the *heirs of his body*, no other *limitation*, nor any *appointment* of it by way of *executory deviſe*, can be made; for the law will not preſume any *term* to have continuance ſo long as iſſue of the body may continue; and therefore a limitation in this reſpect, after an indefinite failure of iſſue, depends upon too remote a poſſibility. S. C. 1. Sid. 451. And it was certified accordingly to the court of chancery, that *Barnaby* the plaintiff had no title. S. C. 2. Keb. 639.—But ſee the Caſes, Nichols *v.* Hooper, 1. Peer. Wms. 198.; Target *v.* Grant, 1. Peer. Wms. 432.; Pinbury *v.* Elkin, 1. Peer. Wms. 565.; Forth *v.* Chapman, 1. Peer. Wms. 666.; Pleydel *v.* Pleydel, 1. Peer. Wms. 748.; Maddox *v.* Stains, 2. Peer. Wms. 421.; Atkinſon *v.* Hutchinſon, 3. Peer. Wms. 259.; Sabberton *v.* Sabberton, Forreſt Rep. 55. 245.; Beauclerk *v.* Dormer, 2. Atk. 313.; Saltem *v.* Saltem, 2. Atk. 376.; Stafford *v.* Buckley, 2. Vezey, 181.; Keiley *v.* Fowler, 6. Brown's Parl. Caſes, 309.; Bigg *v.* Benſley, 1. Brown's Chan. Caſes, 188.; Sheffield *v.* Overy, 3. Peer. Wms. 306; Lyde *v.* Lyde, 1. Term Rep. 593.; Peake *v.* Pegdon, 2. Term Rep. 720.; Porter *v.* Bradley, 3. Term Rep. 143.

Knowles *againſt* Richardſon.

Caſe 109.

ERROR of a judgment in the common pleas in an action upon the caſe for obſtructing a proſpect.

An action will not lie for building a wall, by means of which *a proſpect* is deſtroyed.

SYMPSON. The ſtopping of a proſpect is no nuſance, and conſequently no action on the caſe will lie for it: *Aldred's Caſe*, 9. *Co.* 58. is expreſs, That for obſtructing a proſpect, being matter of delight only, and not of neceſſity, an action will not lie.

TWISDEN, *Juſtice*. Why may not I build up a wall that another man may not look into my yard? Proſpects may be ſtopped, ſo you do not darken the light.—The judgment was reverſed.

S. C. 2. Keb. 611. 642. 1. Vent. 237. 239. Ray. 87. 6. Mod. 116. 314. 1. Sid. 167. 459. Com. 58. 1. Lev. 239. 248. 9. Co. 58. Hob. 131. Hutt. 136. Poph. 170. 2. Salk. 11. Mod. 7, 8. 12. Mod. 215. 510. 519. 635. 648. 1. Ld. Ray. 737.

Anonymous.

Caſe 110.

TWISDEN, *Juſtice*. A man may be indicted for *perjury* in a COURT BARON.

Perjury. 2. Ro. Abr. 257. 3. Peer. Wms. 196. 311. 12. Mod. 511. 1. Hawk. P. C. 319. 2. Stra. 1088. 1. Ld. Ray. 451.

Anonymous.

Caſe 111.

JONES moved to have a *trial at bar* for lands in *Northumberland* of fifty pounds *per annum*.—KELYNGE, *Chief Juſtice*. It is a great way off, and never any jury came from thence in your time.—TWISDEN, *Juſtice*. But I have been of counſel in cauſes wherein

Trial at bar of lands in *Northumberland*. 2. Burr. 834. 1. Ter. Rep. 363.

ANONYMOUS. wherein trials have been granted *at bar* for lands there. We have loſt *Cornwall*; no juries from thence come to the bar, and we ſhall loſe *Northumberland* too.—The other ſide to ſhew cauſe.

* [56]

Caſe 112.

* Anonymous.

Attachment lies for arreſting on *Sunday*.

Hetl. 19. 1. Salk. 87. 6. Mod. 96. 11. Mod. 4. 111. 346. 8. Mod. 80. Cowp. 136. 1. Term Rep. 266.

KELYNGE, *Chief Juſtice*, upon a motion of Mr. HOLT, ſaid, I have known many *attachments* for arreſting a man upon *a Sunday*; but ſtill the affidavit contained, "that he might have "been taken on another day."—TWISDEN, *Juſtice*. So for arreſting a man as he was going to church to diſgrace him.

By 29. Car. 2. c. 7. ſ. 6. it is provided, "that no perſon upon *the* "*Lord's day* ſhall ſerve or execute, or "cauſe to be ſerved or executed, any "writ, proceſs, warrant, order, judg-"ment, or decree (except in the caſes of "treaſon, felony, or breach of the peace), "but that the ſervice of every ſuch writ, "proceſs, warrant, order, judgment, or "decree, ſhall be *void* to all intents and "purpoſes whatſoever; and the perſon "ſo ſerving or executing the ſame ſhall "be as liable to the ſuit of the party "grieved, and to anſwer damages to "him for doing thereof, as if he had "done the ſame without writ, proceſs, "warrant, order, judgment, or decree, "at all."

Memorandum.

Promotion of *Littleton*.

Raym. 185.

IN this Term TIMOTHY LITTLETON, *Serjeant at Law*, was made one of the Barons of the Exchequer.

Memorandum.

Promotions of *Finch* and *Turner*.

IN Eaſter Term 22. *Car.* 2. died SIR JEOFFRY PALMER, BART. *Attorney General*.—SIR HENEAGE FINCH, *Soliciter General*, ſucceeded to his place; and SIR EDWARD TURNER was made Solicitor General.

TRINITY TERM,

The Twenty-Second of Charles the Second,

IN

The King's Bench.

Friday, 3 *June*, 1670.

Sir John Kelynge, *Knt. Chief Juſtice.*

Sir Thomas Twiſden, *Knt.*
Sir William Moreton, *Knt.*
Sir Richard Rainsford, *Knt.*
} *Juſtices.*

Sir Heneage Finch, *Knt. Attorney General.*
Sir Edward Turner, *Knt. Solicitor General.*

Case 1.

Parker *againſt* Welby, late Sheriff of Lincoln.

Trinity Term, 21. *Car.* 2. *Roll* 1505.

ACTION UPON THE CASE againſt a ſheriff for making *a falſe return.* The plaintiff ſets forth, that one *Wright* was indebted to him in ſixty pounds, and did promiſe to pay him, and that thereupon a writ was ſued out againſt him directed to the defendant, being ſheriff of *Lincolnſhire*, who took him into his cuſtody, and after ſuffered him to go at large whither he would, and at the day of return he returned that he had his body ready.

An action on the caſe will not lie againſt a ſheriff for returning *cepi corpus et paratum habeo* when he had let the party to bail; and he may *demur*, or he may plead the 23. *Hen.* 6. c. 10. *in bar*, though he cannot give it in evidence on the general iſſue.—S. C. ante, 33. S. C. 2. Keb. 591. 626. 630. 657. 670. S. C. 2. Saund. 155. S. C. 1. Sid. 439. S. C. 1. Vent. 85. Poſt. 227. 239. 244. Cro. Eliz. 460. Moor, 428. 1. Sid. 22. 1. Lev. 214. 2. Lev. 28. 144. Comyns, 132. 12. Mod. 311. 485. 494. 516. 527. 557. 579. 1. Ld. Ray. 399. 1. Stra. 423.

JONES. They have demurred to the declaration; which I conceive to be a good declaration. For take the caſe, that there went a *latitat* to the ſheriff, and the ſheriff took the perſon upon it, and let him go at large, nobody will deny but that an *action of*

eſcape

PARKER *againſt* WELBY.

eſcape will lie againſt him; and when he makes ſuch *a falſe return* as here, *viz.* "that he has the body ready," why will not an action lie for a falſe return? This is no new caſe, but hath been adjudged in the caſes of *Langton v. Gardiner*, *Moor* 428. and in *Barton v. Aldeworth*, *Cro. Eliz.* 624. It is at the plaintiff's election to follow the ſheriff with *amercements*, or to bring his action for the *falſe return*. And when this action has been brought formerly, they were forced to plead the ſtatute of the 23. *Hen.* 6. c. 10. none ever demurred generally.

TWISDEN, *Juſtice*. I remember a caſe of *Franklyn v. Andrews*, where an action upon the caſe was brought againſt a ſheriff for ſuch a falſe return: he pleaded the ſtatute of 23. *Hen.* 6. c. 10. and they held in that caſe, that the ſheriff could not return any thing elſe but *cepi corpus*; and old HODSON, that ſate here, remembered the caſe of *Langton v. Gardiner*, reported in *Cro. Eliz.* 460. and ſaid, THE COURT did amerce the ſheriff for a bad return; but the judgment was given in that caſe for the plaintiff, becauſe there was a traverſe *aliter vel alio modo*, which could not be, unleſs a falſe return had been confeſſed; and THE COURT ordered judgment to be entered for * the plaintiff for that cauſe. In the caſe of *Franklyn v. Andrews* the Court held, That upon iſſue "not guilty," the ſtatute might be given in evidence: but upon a demurrer you ought to plead the ſtatute; and the general demurrer cannot be helped in this caſe, unleſs you will ſay that it is a general law. *Whelpdale's Caſe (a)* is, that the ſtatute muſt be pleaded, becauſe it is a particular law: but it concerns extortion in all ſheriffs; and the ſtatute of 13. *Eliz.* c. 20. that concerns all parſons touching non-reſidency, is held to be a general law; and it is not to be ſtirred now: but if the point were to be adjudged again, perhaps we might be of another opinion.

* [58]

4. Co. 120. b. 1. Sid. 24. Poſt. 305.

KELYNGE, *Chief Juſtice*. They have relied here upon the falſe return, and the general demurrer I take to be well enough.

MORETON and RAINSFORD, *Juſtices*, accorded; wherefore judgment was given *againſt the plaintiff (b)*.

(*a*) 2. Roll. Abr. 709. 5. Co. 119.

(*b*) In the reports of this caſe in *Saunders*, *Keble*, *Siderfin*, and *Ventris*, it is ſaid, that judgment was given *for the plaintiff*, becauſe the defendant had not *pleaded* the ſtatute 23. Hen. 6. c. 9.; but in the caſe of Samuel v. Evans, Trinity Term 28. Geo. 3. it was at length determined, that this ſtatute is *a public act*, and therefore THE COURT will take notice of it, though it is not pleaded. 2. Term Rep. 569.

Lake

Lake *againſt* King.

Caſe 2.

Michaelmas Term, 20. Car. 2. Roll. 111.

THE plaintiff brought an action upon the caſe for publiſhing *a libel* in which he was defamed, &c. The publication was in delivering ſeveral printed papers, wherein the plaintiff was ſlandered, to ſeveral Members of a Committee of the Houſe of Commons.

If a petition be referred to *a committee*, an action will not lie for printing and diſtributing a number of copies for *the uſe of the members*, altho' the matter be falſe and ſcandalous.

JONES. It is true, if a man make a complaint in a legal way, no action lieth againſt him for taking that courſe, if it be in a competent court: but that which we ſay is not lawful in this caſe, is his cauſing the matter to be printed and publiſhed. Agreeable to this caſe are the common caſes of letters: If a man will write a ſcandalous letter and deliver it to the party himſelf, this is no ſlander (*a*); but if he acquaint a third perſon with it, an action will lie. So here, ſince he will publiſh this matter by printing it, or if he had but written it, it might have been actionable; for the Members ought not to be prepoſſeſſed (*b*).

S. C. Hardres, 470. S. C. 1. Sid. 414. S. C. 1. Lev. 240. S. C. 1. Saund. 131. S. C. 2. Keb. 361. 462. 496. 659. 664. 801. 892. S. C. 2. Vent. 28. S. C. 1. Danv. 196. Godb. 405. Yelv. 152. 4. Co. 14. Hob. 252. 280. Fitzg. 47. 57. 65. 122. 253. 11. Mod. 99. 12. Mod. 218. 1. Ld. Ray. 417. 486.

(*a*) Sed vide 12. Co. 35. Hob. 62. 215. Poph. 139. Salk. 418.

(*b*) This Caſe having depended twelve Terms, JUDGMENT was given, on a demurrer to the plea in bar (by HALE, *Chief Juſtice*, TWISDEN and RAINSFORD, *Juſtices*) for the defendant, on this point, *viz.* that it was the order and courſe of proceedings in parliament to print, and deliver copies, &c. of petitions *after* they are referred to committees. S. C. 1. Saund. 26. S. C. 2. Keb. 832. Sed vide S. C. 1. Sid. 415. 1. Lev. 240.; and between the ſame parties an action was maintained, and damages recovered, for publiſhing a libellous *anſwer* to *this petition before* it had been preſented to the committee, Hard. 470. 2. Keb. 832. Vide Rex v. Saliſbury, 1. Ld. Ray. 341. and 1. Hawk. P. C. c. 73. ſ. 8. 12. 15. 1. Term Rep. 210.

* King *againſt* Standiſh.

Caſe 3.

AN ACTION UPON THE STATUTE OF PRÆMUNIRE for impeaching in the chancery a judgment given in the king's bench. The defendant demurred.

A defendant againſt whom a judgment has been obtained in the king's bench cannot be ſued upon the ſtatute of *præmunire* for bringing *an Engliſh bill* in the court of chancery to be relieved againſt ſuch judgment, although he obtain a decree againſt the plaintiff to enter *ſatisfaction* on the record, and to pay him his *coſts*.—S. C. 1. Sid. 463. S. C. 1. Lev. 241. S. C. 2. Keb. 402. 661. 787. Poſt. 94. Hard. 120. Raym. 227. 3. Keb. 221. 354. Cary, 4. 106. 2. Ld. Ray. 1361. 1. Hawk. P. C. c. 19. ſ. 17.

BIGLAND, *for the defendant*. The queſtion is, Whether the court of chancery be meant within the ſtatute of 27. *Edw.* 3. c. 3. This queſtion has been controverted formerly, but has not been ſtirred within theſe forty years laſt paſt: it concerns the chancery as it is a court of equity. Now the ſtatute cannot be applied to the chancery as ſuch, for it was not a court of equity at that time; and if ſo, then muſt the ſtatute be applied to other courts where the *gravamen* then was. *Mr. Lambard* in his "Juriſdiction of Courts," ſays of this court, that "the king did at firſt determine cauſes in equity in perſon, and about the twentieth "year of Edward the Third, the king, going beyond ſea, dele-

"gated

KING *againſt* STANDISH.

" gated this power to the chancellor ;" and then he ſays, " ſe-
" veral ſtatutes were made to enlarge the juriſdiction of this
" court, as 17. *Rich.* 2. c. 6. &c." But the chancellor took not upon him *ex officio* to determine matters in equity till *Edward the Fourth*'s time; for till then it was done by the king in perſon, or he delegated whom he pleaſed; ſo that the *gravamen* of that ſtatute could not be in the chancery. SECONDLY, It is not poſſible that the king can be diſinherited in his own courts; and therefore the ſtatue muſt be underſtood of courts that ſtand in oppoſition to the king's courts, and only foreign courts: but this court is held by the king's ſeal, and the judgments in it are according to the king's conſcience. THIRDLY, It is ſaid in the ſtatute, " That the offenders ſhall have a day given them to appear be-
" fore the king and his council, or in his chancery, &c.;" and it is ſtrange that the chancery ſhould give the remedy, if that were one of the courts wherein the offence were incurred. My FOURTH REASON is from the penalty: the penalty is very rare and great; for they muſt be put out of the king's protection, their lands forfeited, and their bodies impriſoned at the king's pleaſure. The penalty is fitted well for thoſe that draw the king's ſubjects out of the king's juriſdiction; but ſo great a penalty to be inflicted for ſuing in the king's courts is not ſo reaſonable. If a man ſue
* [60.] in the eccleſiaſtical court for a matter temporal, * ſhall he incur a *præmunire?* An action upon the caſe may lie when a man is miſtaken in the court in which he ought to ſue; but to make it a *præmunire* ſeems not ſo reaſonable: the uſurpations of the biſhop of Rome were the cauſe of the making of this ſtatute, and all other ſtatutes of *præmunire*; 28. *Edw.* 3. c. 1. 16. *Hen.* 6. c. 5. the complaint was all along of the biſhop of Rome's uſurpations, but not a word of the chancery. *Sir John Davies* in his Caſe of *Præmunire* tells us, that all the ſtatutes were made upon this occaſion. Of all the attainders of *præmunire*, there never was one for ſuing in the chancery: the great objection is from theſe words in the ſtatute, " or which do ſue in any other court." Now, ſay they, this laſt disjunctive muſt be applied to this court, and not to the court or courts mentioned before; but I anſwer, there were other eccleſiaſtical courts within this realm beſides that that was a ſtanding court, and had a conſtant dependance upon the pope here, and they were aimed at by this disjunctive: thoſe courts derived their juriſdiction from the court of Rome and not from the king. There is an authority in the point in 5. *Edw.* 4. *pl.* 6. Now for authorities, I confeſs there are great ones againſt me; as in the caſes of *Heath v. Ridley*, *Cro. Jac.* 335. and *Courtney v. Glanvil*, *Moor* 838. my LORD COKE in his chapter of *Præmunire*, and the Year Book 22. *Edw.* 4. fol. 37. But the greateſt authority againſt me is the caſe of *Throgmorton v. Finch*, reported by my LORD COKE in his Treatiſe of Pleas of the Crown, chapter *Præmunire* (*a*); but the practice has been con-

2. Cro. 343.
3. Inſt. 124.
1. Roll. Abr. 381. pl. 2.

(*a*) 3. Inſt. 124.

trary,

trary, not one perſon attainted of a *præmunire* for that cauſe. In king James's time the matter was referred to the counſel, who all agreed, that the chancery was not meant within the ſtatute (*a*); which opinions are inrolled in chancery; and the king, upon the report of their reaſons, ordered the chancellor to proceed as he had done (*b*); and from that time to this I do not find that this point ever came in queſtion: and ſo he prayed judgment for the defendant.

King against Standish.

Saunders. As to that objection, that at the time when this ſtatute was made there were no proceedings in equity, I anſwer, that granting it to be true, yet there is the ſame miſchief; the proceedings in one part of the chancery are *coram dom. rege in cancellariâ*; but an English Bill is directed "to the Lord "Keeper," and decreed: ſo that there is a difference in the proceedings of the ſame court. But admit that courts of equity * are the king's courts, yet they are *aliæ curiæ*, if they hold plea of matters out of their juriſdiction, 16. *Rich.* 2. c. 5. 1. *Roll. Abr.* 381. There is a common objection, that if there were no relief in chancery a man might be ruined; for the common law is rigorous, and adheres ſtrictly to its rules. I cannot anſwer this objection better than it is anſwered to my hand in *Doctor and Student*, *lib.* 1. *cap.* 18. He cited 13. *Rich.* 2. *num.* 30. *Sir Robert Cotton's Records.* It is to be conſidered, What is underſtood by being impeached? Now the words of another act will explain that, *viz.* the 4. *Hen.* 4. c. 23. By that act it appears, "that it "is to draw a judgment in queſtion any other way than by writ of "error or attaint." One would think this ſtatute ſo fully penned that there were no room for an evaſion. There was a temporary ſtatute, which is at large in *Raſtall*, 31. *Hen.* 6. c. 2. in which there is this clauſe, *viz.* "that no matter determinable at com-"mon law ſhall be heard elſwhere;" *à fortiori*, no matter determined at common law ſhall be drawn in queſtion elſewhere. He cited 22. *Edw.* 4. *pl.* 36. *Sir Moyle Finch v. Throgmorton*, 2. *Inſt.* 335. and *Glanvill v. Courtney:* he put them alſo in mind of the article againſt Cardinal Wolsey, in *Coke's Juriſdiction of Courts. Tit.* "*Chancery.*" So he prayed judgment for the plaintiff.

* [61]

Poſt. 94.

Kelynge, *Chief Juſtice.* It is fit that this cauſe be adjourned into the exchequer chamber for the opinions of all the Judges to be had in it (*c*): we know what heats there were betwixt Lord Coke and Lord Ellesmere, which we ought to avoid (*d*).

(*a*) 3. Bl. Com. 53.

(*b*) See the Appendix to 3. Chan. Rep. 26.

(*c*) This Caſe was moved again in the king's bench to *Sir Matthew Hale*, on his being promoted to the chief ſeat in that court; and the parties diſcovering that, in his opinion, the matter was not within the ſtatute of *præmunire*, they dropped all further proceedings in the cauſe. S. C. 1. Lev. 241.

(*d*) See the hiſtory of the riſe, progreſs, and termination, of this conteſt between the courts of *king's bench* and *chancery*, 3. Bl. Com. 53, 54.

Turner

Case 4.

Turner *againſt* Benny.

In an action on the caſe upon *an agreement* to ſurrender copyhold lands generally, an averment that he ſurrendered the lands into the hands of two tenants of the manor *ſecundum conſuetudinem, &c.* is ſufficient, without ſhewing the cuſtom.

A WRIT OF ERROR was brought to reverſe a judgment in the common pleas in an action upon the caſe, wherein the plaintiff declared, That it was agreed between himſelf and the defendant, that the plaintiff ſhould ſurrender to the uſe of the defendant certain copyhold lands; and that the defendant ſhould pay for thoſe lands a certain ſum of money: and then he ſets forth, that he did ſurrender the ſaid lands into the hands of two tenants of the manor out of court, *ſecundum conſuetudinem, &c.*

EXCEPTION. The promiſe is, to ſurrender generally, which muſt be * underſtood of a ſurrender to the lord or to his ſteward; and the declaration ſets forth a ſurrender to two tenants, which is an imperfect ſurrender, *Cro. Car.* 299.

* [62]

S. C. 1. Lev. 293.
S. C. 2. Keb. 666.
1. Roll. Abr. 499.
Cro. Eliz. 717.
Gilb. Eq. Rep. 8. 13. 78. 96. 121.
2. Mod. 352.
2. Ld. Ray. 1145.
1. Peer. Wms. 16. 61. 280. 330. 354. 443. 781.
2. Peer. Wms. 258. 261. 490.
3. Peer. Wms. 151. 283. 322. 358.
Hob. 88. 106.
9. Co. 76. a. b.

KELYNGE, *Chief Juſtice.* But in that caſe there are not the words "*ſecundum conſuetudinem*," as in this caſe.

JONES. In *Hilary Term* 22. *Car.* 1. *Roll* 1735, in the caſe of *Treburn v. Purchas*, two points were adjudged: FIRST, That when there is an agreement for a ſurrender generally, then ſuch a particular ſurrender is naught. SECONDLY, That the alledging of a ſurrender *ſecundum conſuetudinem* is not ſufficient; but it ought to be laid, that there was ſuch a cuſtom within the manor, and then, that according to that cuſtom he ſurrendered into, &c. Accordingly is the caſe of *Diveret v. Ratcliffe*, *Cro. Eliz.* 185.

COLEMAN, *contra.* We do ſay, that we were to ſurrender generally; and then we aver, that actually we did ſurrender *ſecundum conſuetudinem*; and if we had ſaid no more it had been well enough: then the adding, "into the hands of two tenants, &c." I take it that it ſhall not hurt. Beſides, we need not to alledge a performance, becauſe it is a mutual promiſe; and he cited the caſe of *Camphugh v. Brathwait*, *Hob.* 88. 106.

TWISDEN, *Juſtice.* I remember the caſe of *Treburn*; he was my client; and the reaſon of the judgment is in *Combe's Caſe*, becauſe the tenants are themſelves but attornies. And they compared it to this caſe: I am bound to levy a fine; it may be done either in court or by commiſſion, but I muſt go and know of the perſon to whom I am bound how he will have it, and he muſt direct me.—In the principal caſe the judgment was affirmed, *niſi, &c.*

Case 5.

Turner *againſt* Davies.

Eaſter Term, 22. *Car.* 2. *Roll* 576.

An adminiſtrator who obtains judgment in trover, on a converſion in his own time, for goods of the inteſtate, cannot take out execution thereon, if the adminiſtration be afterwards revoked.—S. C. Co. Ent. 91. a. S. C. 2. Saund. 148. S. C. 2. Keb. 668. Yelv. 83. 125. Cro. Car. 138. 208. 227. Carter, 138. 6. Mod. 92. Fitzg. 202. 257. 10. Mod. 21. 389. 1. Vern. 25. Comyns, 18. 150. 2. Peer. Wms. 576. 3. Peer. Wms. 81, 88. 2. Ld. Ray. 1216. 1 Term Rep. 480.

AUDITA QUERELA. The point was this, *viz.* An adminiſtrator recovers damages in an action of trover and converſion

verſion for goods of the inteſtate taken out of the poſſeſſion of the adminiſtrator himſelf: then his adminiſtration is revoked, and the queſtion is, Whether he ſhall have execution of the judgment notwithſtanding the revocation of his adminiſtration?

TURNER *againſt* DAVIES.

SAUNDERS. I conceive he cannot, for the adminiſtration being revoked, his authority is gone. *Doctor Drurie's Caſe*, in the *Eighth Report* (*a*), is plain; and there is a precedent in the *New Book of Entries* (*b*).

BARREL. I conceive he * may take out execution, for it is not in right of his adminiſtration: he lays the converſion in his own time, and he might in this caſe have declared in his own name; and he cited and urged the reaſon of *Packman's Caſe*, 6. *Co.* 18. and *Cro. Eliz.* 460.

* [63]

KELYNGE, *Chief Juſtice*. He might bring the action in his own name, but the goods ſhall be aſſets. If goods come to the poſſeſſion of an adminiſtrator, and his adminiſtration be repealed, he ſhall be charged as executor of his own wrong. Now in this caſe, the adminiſtration being repealed, ſhall he ſue execution to ſubject himſelf to an action when done?

TWISDEN, *Juſtice*, I think it hath been ruled, that he cannot take out execution, becauſe his title is taken away.

THE COURT gave judgment againſt the defendant.

(*a*) 8. Co. 144. (*b*) Co. Ent. 89.

Jordan *againſt* Martin. Caſe 6.

Eaſter Term, 22. *Car.* 2. *Roll* 474.

EXCEPTION was taken to an avowry for a rent-charge, That the avowant having diſtrained the beaſts of *a ſtranger* for his rent, does not ſay that they were *levant et couchant*.

If a landlord ſeize cattle for a heriot, or diſtrain them for rent, he need not ſhew that they were *levant et couchant*.

COLEMAN. The beaſts of a ſtranger are not liable to a diſtreſs unleſs they be *levant et couchant*. *Roll* "*Diſtreſs*," 668, 672. *Reignold's Caſe*.

TWISDEN, *Juſtice*. Where there is a cuſtom for the lord to ſeize the beſt beaſt for *a heriot*, and the lord does ſeize the beſt beaſt upon the tenancy, it muſt come on the other ſide to ſhew that it was not the tenant's beaſt.

KELYNGE, *Chief Juſtice*. The cattle of a ſtranger cannot be diſtrained, unleſs they were *levant et couchant*; but it muſt come on the other ſide to ſhew that they were not ſo.

THE COURT, therefore, gave judgment for the defendant (*a*).

S. C. 2. Keb. 669. 2. Show. 328. 329. 1. Saund. 27. 222. 346. 2. Saund. 287. 289, 290. 325. Co. Lit. 47. 475. Poſt. 74. 75. 216. Neſ. Lutw. 203. 416. 425. 433. to 436. Prec. in Ch. 7. 1. Ld. Ray. 170. 644. 720.

(*a*) It is ſaid S. C. 2. Keb. 669. that judgment was given for the plaintiff.

Caſe 7.

Wayman *againſt* Smith.

Rule granted to ſhew cauſe, why a prohibition ſhould not go to an inferior court, on a ſuggeſtion that the cauſe of action aroſe out of its juriſdiction.

A PROHIBITION was prayed to the court of *Briſtol* upon this ſuggeſtion, *viz.* That the cauſe of action did not ariſe within the juriſdiction of the court.

WINNINGTON. There was a caſe here of *Smith v. Bond*, in *Hilary Term*, 17. *Car.* 2. *Roll* 501. on a prohibition to *Marlborough*; the ſuggeſtion grounded on *Weſtminſter* 1. cap. 34. granted; and there needs not a plea in the ſpiritual court to the juriſdiction: for that he cited * *F. N. B.* 49. But he ſaid, he had *an affidavit*, that the cauſe of action did ariſe out of their juriſdiction.

* [64]

S. C. 2. Keb. 673.
S. C. 1. Sid. 464.
S. C. 1. Vent. 88.
Ante, 32.
Poſt. 81.
1. Lev. 50. 69. 96. 104. 137. 153. 208. 289. 2. Mod. 131. 1. Saund. 74. 2. Inſt. 230. 12. Mod. 135. 173. 206. 435. 445. 2. Ld. Ray. 1408. 1. Peer. Wms. 43. 476.

TWISDEN, *Juſtice*. I doubt you muſt plead to the juriſdiction of the court. I remember a caſe here, wherein it was held ſo; and that if they will not allow it, then you muſt have a prohibition.

WINNINGTON. *Fitzherbert* is full.

RULED, That the other ſide ſhall ſhew cauſe why *a prohibition* ſhould not go, and things to ſtay (*a*).

(*a*) In S. C. 2. Keb. 673. it is ſaid, the prohibition was *denied*. In S. C. 1. Sid. 464. it is ſaid, that it was *granted*. And S. C. 1. Vent. 88. leaves the matter *undetermined*.—*Sed quære*, If this is not the caſe alluded to by HALE, *Chief Juſtice*, in *Car v. St. Alban's*, where he ſays, that the Courts will not grant a prohibition upon a mere ſurmiſe that the matter is out of the juriſdiction, Poſt. 81. for the party muſt avail himſelf of this defect in the court below, Cowp. 20. But if, after imparlance, *a plea* be tendered and refuſed, Poſt. 81. Ld. Ray. 884. Cowp. 166. or if *want of juriſdiction appear upon the face of the proceedings*, a prohibition ſhall go, Dougl. 378. even to a court of appeal after the ſuit is remitted to the court below, and coſts awarded againſt the appellant, 1. Term Rep. 552. and without impoſing any term on the party applying for it, 3. Term Rep. 315. See 4. Term Rep. 351.

Caſe 8.

Humlock *againſt* Blacklow.

Eaſter Term, 21. *Car.* 2. *Roll* 288.

If *A.* covenant that he will not uſe ſuch a trade, and in *conſideration of the performance* thereof *B.* covenants to pay him an annuity, this is not a *condition precedent*, but a *negative covenant*.

DEBT upon a bond for performance of covenants in articles of agreement. The plaintiff covenanted with the defendant to aſſign over his trade to him, and that he ſhould not endeavour to take away any of his cuſtomers; and in conſideration of the performance of theſe covenants, the defendant did covenant to pay the plaintiff ſixty pounds *per annum* during his life.

SAUNDERS. The words "*in conſideratione performationis*" make it a condition precedent; which muſt be averred, 3. *Leon.* 219. and thoſe covenants muſt be actually performed.

S. C. 2. Saund. 155. S. C. 1. Sid. 464. S. C. 2. Keb. 674. 2. Mod. 33. 75. 1. Vent. 41. 2. Saund. 166. 10. Mod. 189. 154. 222. 420. 12. Mod. 455. 503 8. Mod. 42. Comyns, 228. 231. 513. 1. Ld. Ray. 665. 2. Ld. Ray. 766. 1. Strahge, 459. 535. 569. Dougl. 684. 689. 1. Term Rep. 638. 645.

TWISDEN,

TWISDEN, *Juſtice*. How long muſt he ſtay then, till he can be entitled to his annuity? As long as he lives; for this covenant may be broken at any time. That is an expoſition that corrupts the text. HUNLOCK *againſt* BLACKLOW.

THE COURT gave judgment for the plaintiff.

Wingfield's Caſe. Caſe 9.

IT was moved by one HUNT, that the *venue* might be changed in an action of *indebitatus aſſumpſit* brought by *Mr. Wingfield*. A barriſter may lay his *venue* in *Middleſex*, and the Court will not change it on the uſual affidavits.

JONES. I conceive it ought not to be changed, being in the caſe of *a counſellor at law*, by reaſon of his attendance upon this Court.

TWISDEN, *Juſtice*. In *Mr. Bacon's Caſe* of *Gray's Inn*, they refuſed to change the *venue* in the like caſe.—So the rule was not granted.

2. Vent. 47. 2. Show. 176, 242. 2 Salk. 668. 670.

Fitz. 40. 1. Ld. Ray. 342. 399. 533. 702. 2. Ld. Ray. 1556. 2. Stra. 822. 6. Mod. 123.

The King *againſt* Morris. Caſe 10.

AN INDICTMENT againſt one *Morris* in *Denbighſhire*, for murder, was removed into the king's bench by *certiorari*, to prevent the priſoner's being acquitted at THE GRAND SESSIONS; and the Court directed to have an indictment found againſt him on the ſtatute 26. *Hen.* 8. c. 6. in the next *Engliſh county*, VIZ. at *Shrewſbury*. On an indictment for murder being removed from *Wales*, the Court may direct it to be tried in the next *Engliſh county*.

next *Engliſh county*.—S. C. 2. Keb. 681. 685. 724. 797. S. C. poſt. 68. S. C. 1. Vent. 93. 146. 1. Ld. Ray. 581. 2. Ld. Ray. 836. 2. Stra. 704. Dougl. 162. 751. 2. Term Rep. 125. 3. Term Rep. 658.

See the 34. & 35. Hen. 8. c. 26.

*Taylor and Rouſe, Churchwardens of Downham, *againſt* their Predeceſſors. Caſe 11.

THE ACTION was to make them account for a bell. They plead, that they delivered it to a bell-founder to mend, and that it is yet in his hands. The plaintiff demurs. In an action by churchwardens againſt their predeceſſors for taking *a bell*, they may plead that it is at the *founder's*; but it muſt be laid *bona parochianorum*.

The cauſe of his demurrer was, That this was no good plea in bar of the account, though it might be a good plea before auditors, 1, *Roll. Abr.* 121.

PEMBERTON. I conceive it is a good plea, for wherever the matter or cauſe of the account is taken off, the plea is good in bar. But he urged, that the action was brought for taking away

S. C. 2. Keb. 675. 704. S. C. 1. Danv. 223. Ante, 42. 1. Roll. Abr. 118. 121. 1. Vent. 89. 10. Mod. 22. Fitz. 44. 1. Stra. 680. S.C. 1. Vent. 88.

CHURCH-WARDENS *against* THEIR PREDECESSORS.

"*bona ecclesiæ*," and not "*bona parochianorum*," as it ought to have been.

THE COURT. The property is not well laid; so ordered to mend all, and plead *de novo*.

Memorandum.

Raym. 188. IN this Term HUGH WYNDHAM, *Serjeant at Law*, was made a Baron of the Exchequer.

MICHAELMAS

MICHAELMAS TERM,

The Twenty-Second of Charles the Second,

IN

The King's Bench.

Monday, 24. October, 1670.

Sir John Kelynge, *Chief Juſtice.*

Sir Thomas Twiſden, *Knt.*
Sir William Moreton, *Knt.*
Sir Richard Rainsford, *Knt.* } *Juſtices.*

Raym. 189.
2. Keb. 684.

Sir Heneage Finch, *Knt. Attorney General.*
Sir Edward Turner, *Knt. Solicitor General.*

N. B. KELYNGE *was ſick of an Ague the whole Term, of which he died on the Eſſoin Day of the Eaſter Term following.*

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* The King *againſt* the Inhabitants of Eaſt Grinſtead. Caſe 12.

AN INQUISITION was returned upon the ſtatute of *Merton*, 20. *Hen.* 3. c. 4. and the ſtatute of *Weſtminſter* 2. 13. *Edw.* 1. *c.* 46. againſt pulling down *incloſures*; and the parties took iſſue as to the damages only.

On the return of a *diſtringas* to a *noctanter*, if the wills plead to the *damages* only, there ſhall be judgment for *repair* until *ens quiry* executed. S. C. 2. Keb. 1. Cro. 580.

It was moved, that before the trial for the damages there might be judgment given to have them ſet up again, having been long down.

663. 683. 723. S. C. Tremain, 348. Lutw. 157. Cro. Car. 288. 2. Roll. Abr. 898. 10. Mod. 157. 1. Lch Ray. 616.

THE KING *againſt* EAST GRINSTEAD.

TWISDEN, *Juſtice*. When you have judgment for the damages, then one *diſtringas* will ſerve for ſetting up the incloſure (*a*) ſand the damages too; as in an action where part goes by *default* and the other part is *traverſed*, you ſhall not take out execution till that part which is traverſed be tried.

(*a*) See 29. Geo. 2. c. 36. and 31. Geo. 2. c. 42.

Caſe 13.

Anonymous.

A witneſs ſubpœna'd is protected from arreſt *eundo et redeundo*.

UPON a motion by MR. DOLBEN for an attachment, TWISDEN, *Juſtice*, ſaid, If a man has a ſuit depending in this court, and be coming to town to proſecute or defend it here, he cannot be ſued elſewhere: but if a man come hither as a witneſs, he is protected *eundo et redeundo*.

S.C. 1. Vent. 11. 20. *Hen.* 6. pl. 4. 2. Roll. Ab. 273. 10. Mod. 333. Brownl. 15. Raym. 101. 2. Mod. 181. 1. Ch. Rep. 92. 2. Salk. 544. Gilbert's Com. P. 207. 2. Black. Rep. 1113. Tidd's Prac. 51. And ſee the caſe of Meekins *v.* Smith, H. Bl. Rep. 636.; and Kinder *v.* Williams, 4. Term Rep. 377.

Caſe 14.

Wootton *againſt* Heal.

In covenant on a warranty againſt all perſons, a breach aſſigned that *A. having lawful title* entered, &c. without ſhewing what his title was, is erroneous.

AN ACTION OF COVENANT was brought upon a warranty in a fine, a term for years being evicted.

SAUNDERS. I acknowledge that an action of covenant does well lie in this caſe; but the plaintiff aſſigns his breach in this, *viz.* That one *Stowell*, having lawful right and title, did enter upon him and evict him, which perhaps he did by virtue of a title derived from the plaintiff himſelf.

S. C. poſt. 290. S. C. 2. Saund. 177. S. C. 1. Lev. 301.

JONES, *contra*. To ſuppoſe that *Stowell* claimed under the plaintiff is a foreign intendment; and it might as well come on the defendant's ſide to ſhow it: and ſince the caſe of *Kirby v. Hanſaker* (*a*), the ſtatute of 21. *Jac.* 1. c 13. and the late act of 16. and 17. *Car.* 2. c. 8. have much ſtrengthened verdicts.

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S. C. 1. Sid. 466. S. C. 2. Keb. 684. 703. 709. 723. Poſt. 101. 2. Lev. 37. 194. 3. Lev. 325. Cro. Jac. 444. 2. Mod. 213. 3. Mod. 136. Comyns, 146. 180. 230. 333. 376. 627. 2. Strange, 1011.

TWISDEN, *Juſtice*. The ſtatutes *of Jeofails* do not help * when the Court cannot tell how to give judgment. The plaintiff ought to entitle himſelf to his action; and it is not enough for the jury to entitle him.

JONES. You have waived the title here, and relied upon the entry of the iſſue only, which is "*non intravit*, &c.

CURIA *adviſare vult*.—

Afterwards, on this caſe being moved and argued again, THE COURT arreſted the judgment, and awarded a *nil capiat per billam* againſt the plaintiff.

Dougl. 43. H. Bl. Rep. 275. 1. Term Rep. 671. 3. Term Rep. 584.

(*a*) Cro. Jac. 325.

Laſſels

Laſſels *againſt* Catterton. Caſe 15.

AN ACTION OF COVENANT for further aſſurance, the covenant being to make ſuch conveyance, &c. as counſel ſhould adviſe. They alledge for breach, that they tendered ſuch a conveyance as was adviſed by counſel, *viz.* a leaſe and releaſe, and ſet it forth with all the uſual covenants.

On an agreement to make a conveyance of all lands in *A.* in the poſſeſſion of *B.* the party is not bound to execute a conveyance, with a warranty of thoſe lands and all other lands in *A.*

LEVINZ for the defendant moved in arreſt of judgment—I conceive they have tendered no ſuch conveyance as we are bound to execute; for we are not obliged to ſeal any conveyance with covenants, nor with a warranty. Beſides, that which they have tendered has *a warranty*, not only againſt the covenantor, but one *Wilſon*. Cro. *Jac.* 571. 1. *Roll. Abr.* 424. Again, our covenant is, to convey all our lands in *Bomer*; and the conveyance tendered is, of all our lands in the lordſhip of *Bomer*.

S. C. 1. Sid. 467. S. C. Ray. 190. S C. 2. Keb. 685. 1. Roll. Abr. 424. Cro. Jac. 571. 2. Danv. 36. Owen, 65. 1. Ro. Rep. 71. 2. Ro. Rep. 91. 1. Leon. 29. Gilb. Eq. Rep. 108. 166. 252. 12. Mod. 399. Com. Dig. 454.

TWISDEN, *Juſtice*. For the laſt exception, I think we ſhall intend them to be both one: and I know it hath been held, that if a man be bound to make any ſuch reaſonable aſſurance as counſel ſhall adviſe, uſual covenants may be put in; for the covenant ſhall be ſo underſtood. But there muſt not be a warranty in it: though ſome have held, that there may be a warranty againſt himſelf: but I queſtion whether that will hold.

But WESTON, on the other ſide, ſaid, that the objection as to the warranty was fatal, and he would not make any defence.

1. Ld. Ray. 36. 402. 2. Ld. Ray. 750. 1095. 1.

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* The King *againſt* Morris. Caſe 16.

MR. ATTORNEY FINCH ſhewed cauſe why a *certiorari* ſhould not be granted to remove an indictment of murder out of *Denbighſhire* in *Wales*.

A *certiorari* will lie to remove an indictment for murder from the grand ſeſſions in *Wales*.

TWISDEN, *Juſtice*. In the ſecond and eight years of *Charles* the Firſt it was held, that a *certiorari* did lie in *Wales*.

S. C. ante, 64. S. C. 2. Keb. 681. 685. 724. 797. S. C. 1. Vent. 93. 146. 1. Lev. 291. Vaugh. 395. Raym. 206. 2. Saund. 193. 1. Mod. 10. 8. Mod. 139. 146. 12. Mod. 643.

MORETON, *Juſtice*. By 34. & 35. *Hen.* 8. c. 26. the Juſtices of THE GREAT SESSIONS have power to try all murders, as the Judges here have; and the ſtatute of 26. *Hen.* 8. c. 6. for the trial of murders in the next *Engliſh* county, was made before that of the 34. & 35. *Hen.* 8. c. 26.

TWISDEN, *Juſtice*. I never yet heard that the ſtatute of 34. *Hen.* 8. c. 26. had repealed that of the 26. *Hen.* 8. c. 6. It is true, the Judges of THE GRAND SESSIONS have power, but the ſtatute that gives it them, does not exclude this Court.—To be moved when the Chief Juſtice ſhould be in court.

2. Hawk. P. C. 316. 1. Ld. Ray. 581. 836. 1408. 1. Stra. 553. 630. 704. 2. Stra. 945. Dougl. 751. 3. Term Rep. 658.

Caſe 17.

Franklyn's Caſe.

If a ſtatute direct a commitment by *two juſtices*, a warrant for ſuch purpoſe by *one juſtice* only is bad.
Ante, 13.
Burr. S. C. 136.
2. Bl. Rep. 1017.
3. Term Rep. 1017.

FRANKLYN was brought into court by *habeas corpus*; and the return being read, it appeared that he was committed upon the ſtatute 17. *Car.* 2. c. 2. ſ. 5. as a preacher at ſeditious conventicles.

COLEMAN prayed he might be diſcharged. He ſaid, this commitment muſt be upon the *Oxford Act*; for the laſt Act only orders "a conviction;" and the Act for Uniformity of 12. *Car.* 2. c. 17. "a commitment only after the biſhop's certificate." But the *Oxford Act* provides, "That it ſhall be done by *two juſtices* of the "peace, upon oath made before them:" and in this return but one juſtice of peace is named; for *Sir William Palmer* is mentioned as deputy-lieutenant, and you will not intend him to be a juſtice of peace; nor does it appear that there was any oath made before them.

TWISDEN, *Juſtice*. Upon the ſtatute of the 18. *Eliz.* c. 5. which appoints, "that two juſtices ſhall make orders for the keeping of baſtard children, whereof one to be of the *quorum*," I have got many of them quaſhed, becauſe it was not expreſſed that one of them was of the *quorum* (*a*).—Whereupon *Franklyn* was diſcharged.

(*a*) But now by the 26. Geo. 2. c. 27. "No warrant or other inſtrument "made or executed by two juſtices "which doth not *expreſs* that one is of "the *quorum* ſhall be vacated for that "defect only." And by 7. Geo. 3. c. 21. "All acts, &c. executed by two "juſtices qualified to act within ſuch "cities and liberties as have only one "juſtice of the *quorum*, ſhall be valid and "effectual in law, as if one of the ſaid "juſtices had been of the *quorum*."—See 1. Black. Com. 351.

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Caſe 18.

*Anonymous.

Oyer cannot be demanded after the expiration of the term in which the *profert* is made.

UPON a motion for time to plead in a great cauſe about brandy, TWISDEN, *Juſtice*, ſaid, If it be *in bar*, you cannot demand *oyer* of the *letters patents* (*a*) the next Term; but if it be in *a replication*, you may; becauſe you mention the precedent Term *in* THE BAR, but not in *the replication*.

1. Saund. 8. Dyer, 29. 5. Co. 75. Lane, 39. 10. Co. 95. 1. Ld. Ray. 84. 347. Salk. 119. Barnes Notes, 158. 163. 169. 185. 234. 250.—(*a*) See the caſe of Rex v. Amery, 1. Term Rep. 149. Dougl. 215. 477. where this caſe is recognized as law.

Caſe 19.

Yard *againſt* Ford.

An action will lie for erecting a market to the *injury* of the plaintiff's market, although they were held on *different days*.—S. C. 2. Saund. 172. S. C. 1. Lev. 296. S. C. 1. Vent. 98. S. C. Ray. 195. S. C. 2. Keb. 689. 706. 1. Roll. Abr. 117. 2. Roll. Abr. 140. 10. Mod. 258. 354. 11. Mod. 67.

JONES moved in arreſt of judgment. An action upon the caſe was brought for keeping a market without warrant, it being in prejudice of the plaintiff's market. The action, he ſaid, would

not

not lie, becauſe the defendant did not keep his market on the ſame day that the plaintiff kept his; which he ſaid is implied in the caſe in 2. *Roll.* 140.

Yard *againſt* Ford.

SAUNDERS *contra.* Upon a writ of *ad quod damnum*, they enquire of any markets generally, though not held the ſame day. In this caſe, though the defendant's market be not held the ſame day that our's is, yet it is a damage to us in foreſtalling our market.

TWISDEN, *Juſtice.* I have not obſerved that the day makes any difference. If I have a fair or market, and one will erect another to my prejudice, an action will lie; and ſo of a ferry. It is true, for one to ſet up a ſchool by mine, is *damnum abſque injuriâ*.—Ordered to be moved again, and afterwards judgment was given for the plaintiff.

Cock *againſt* Honychurch. Caſe 20.

Michaelmas Term, 22. Car. 2. Roll 835.

PAWLET moved in treſpaſs, that the defendant pleaded in bar, that he had paid three pounds, and made a promiſe to pay ſo much more in ſatisfaction; and ſaid it was a good plea, and did amount to an accord with ſatisfaction; an action being but a contract, which this was.—TWISDEN, *Juſtice.* An accord *executed* is pleadable in bar, but *executory* not.

Payment of part, and a promiſe to pay the remainder, of a debt, cannot be pleaded as an *accord and ſatisfaction.*

S. C. Ray. 203. S. C. 2. Keb. 690. Ante, 7. 9. Co. 79. 1. Roll. Abr. 129. 4. Mod. 89. 8. Mod. 290. 345. 10. Mod. 224. Gilb. Eq. Rep. 89. 1. Ld. Ray. 122. 1. Stra. 23. 426. 573. 1. Peer. Wms. 324. 2. Peer. Wms. 343. 553. (614.) (616.). 3. Peer. Wms. 225. 245. 353. 1. Com. Dig. "Accord" (B 4.).

The King *againſt* Allen. Caſe 21.

TWISDEN, *Juſtice.* There are two clauſes in the ſtatute of 37. *Hen.* 8. c. 9. of uſury: If there be a corrupt agreement at the time of the lending of the money, then the bonds and all the aſſurances are void; but if the agreement be good, and afterward he receives more than he ought, then he forfeits the treble value (*a*).

In uſury the *corrupt agreement* makes the *contract void*, and the *taking* illegal intereſt incurs *the penalty.*

S. C. 1. Vent. 38. S. C. Ray. 196. S. C. 2. Keb. 690. 1. Sid. 421. 1. Saund. 295. 2. Mod. 307. Comyns, 583. 2. Ld. Ray. 1144. Caſ. Tem. Talb. 39. 2. Stra. 816. 1043. 1243. 10. Mod. 449. 11. Mod. 174. 12. Mod. 385. 493. 517. Barnes, 51.

(*a*) See 3. Atk. 154. 1. Hawk. P. C. 530. and the caſe of Floyer *v.* Edwards, Cowp. 114. where the law of this caſe is confirmed by LORD MANSFIELD.—See alſo 2. Black. Rep. 859. Cowp. 728. and the caſe of Lord Irnham *v.* Child, 1. Brown Rep. Chan. 93. and 1. H. Bl. Rep. 462. Morſe *v.* Wilſon, 4. Term Rep. 353. and the ſtatute of the 12. Ann. c. 16.

Bonnefield's

Caſe 22.

* Bonnefield's Caſe.

Miſnomer cannot be pleaded to the writ of *excommunicato capiendo*.

BONNEFIELD was brought into court upon a *capias excommunicato*; and it was urged by PAWLET, that he might be delivered, for that his name was *Bonnefield*, and the *capias excommunicato* was againſt one *Bromfield*.—TWISDEN, *Juſtice*. You cannot plead that here to a *capias excommunicato*. You have no day in court, and we cannot bail upon this; but you may bring your action of falſe impriſonment.

Cro. Car. 199. 20. Mod. 65. 279. 350. 22. Mod. 69. 275. 418. 517. 580. 11. Mod. 83. 112. 173. 191. 1. Ld. Ray. 619. 701. 2. Ld. Ray. 817. 789. Comyns, 541. 1. Vern. 24. 1. Peer. Wms. 435. 3. Peer. Wms. 53. 1. Strange, 43. 76. 265. 2. Stra. 946. 1067. 1189. 1218.

Caſe 23.

Caterall *againſt* Marſhall.

In *caſe* on a promiſe to give a bond with ſufficient penalty, the omiſſion of ſtating *the penalty* is bad on *demurrer*, but good *after verdict*.

ACTION UPON THE CASE, in the common pleas; wherein the plaintiff declares, That in conſideration that he would give the defendant a bond of ſufficient penalty to ſave him harmleſs, he would, &c. and ſets forth, that he gave him a bond with ſufficient penalty; but does not expreſs what the penalty was. This was moved in arreſt of judgment.

JONES. After a verdict it is good enough; as in the caſe of *Auſtin v. Gervaiſe*, *Hob.* 69.

TWISDEN, *Juſtice*. If it had been upon a demurrer, I ſhould not have doubted but that it had been naught.

RAINSFORD and MORETON, *Juſtices*. But the jury have judged the penalty to be reaſonable, and have found the matter of fact.

TWISDEN, *Juſtice*. The jury are not judges what is *reaſonable* and what unreaſonable (*a*): but this is after a verdict.—And ſo, the judgment was affirmed, the cauſe coming into the king's bench upon a writ of error.

S. C. 2. Keb. 692. S. C. 1. Lev. 297. S. C. 1. Vent. 99. 1. Sid. 270. 4. Burr. 2471. 2. Term Rep. 388. 3. Term Rep. 65.

(*a*) See ante, note (*a*), page 27, Butler *v.* Play.

Caſe 24.

Martin *againſt* Delboe.

To an *aſſumpſit* on a promiſe to pay ſo much out of the net proceeds of

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goods, the defendant may plead, that "the "cauſe of action "did not ariſe within ſix years;" for this is not within the exception of 21. *Jac.* 1. c. 16.—

AN ACTION UPON THE CASE ſetting forth, That the defendant was a merchant, and tranſmitted ſeveral goods beyond ſea; and promiſed the plaintiff, that if he would give him ſo much money, he would pay him ſo much out of the proceed of ſuch a parcel of goods as he was to receive from * beyond ſea. The defendant pleaded the ſtatute of limitations, and doth not ſay, *non aſſumpſit infra ſex annos*, but that "the cauſe of action did not "ariſe within ſix years." The plaintiff demurs, Becauſe the cauſe is between merchants, &c.

S. C. 2. Keb. 674. 696. 717. S. C. 1. Sid. 465. S. C. 1. Vent. 89. S. C. 1. Lev. 298. Poſt. 89. 268. 2. Saund. 125. 2. Mod. 312. 1. Lev. 287. Abr. Eq. 304. 1. Vern. 695. 22. Mod. 579. 1. Stra. 536. 2. Stra. 836. 1. Peer. Wms. 742.

SYMPSON.

SYMPSON. The plea is good. Accounts within the ſtatute muſt be underſtood of thoſe that remain in the nature of accounts: now this is a ſum certain. MARTIN *againſt* DALBOE.

JONES *accorded.* This is an action upon the caſe, and an action upon the caſe between merchants is not within the exception: and the defendant has pleaded well in ſaying, that "the cauſe of "action did not ariſe within ſix years;" for the cauſe of action ariſeth from the time of the ſhip's coming into port, and the ſix years are to be reckoned from that time.

TWISDEN, *Juſtice.* I never knew but that the word "accounts" in the ſtatute was taken only for actions of account. An *inſimul computaſſet* brought for a ſum certain upon an account ſtated, though between merchants, is not within the exception.—So judgment was given to the defendant *(a)*.

(a) This caſe was adjourned, S. C. 1. Vent. 90. upon a doubt, whether this appeared ſufficiently on the declaration to be an *account ſtated* between theſe parties, S. C. 1. Sid. 465. and the Court, though after argument, permitted the plaintiff to diſcontinue, S. C. 1. Lev. 298. in order that he might bring an action of account. S. C. 2. Keb. 717.

The King *againſt* Leginham. Caſe 25.

Eaſter Term, 20. Car. 2. Roll 163.

AN INFORMATION was exhibited againſt him for taking unreaſonable diſtreſſes of ſeveral of his tenants.

Neither an *information* nor *indictment* will lie for taking an exceſſive diſtreſs: the remedy is by *action* on the *ſtatute of Marlbridge.* An indictment charging a man to be *communis oppreſſor* is too general.

JONES moved in arreſt of judgment, FIRST, That *an information* would not lie for ſuch cauſe. The ſtatute of *Marlbridge*, c. 4. ſaith, that if the lord take an unreaſonable diſtreſs he ſhall be *amerced*, ſo that *an information* will not lie: and my LORD COKE upon MAGNA CHARTA ſays, the party grieved may have his *action* upon the ſtatute.

SECONDLY, But admitting that an information would lie, yet it ought to have been more particular, and to have named the tenants; for it is not ſufficient to ſay in general, that he took unreaſonable diſtreſſes of ſeveral of his tenants.

THIRDLY, The ſecond part of the information, *viz.* that he is *communis oppreſſor*, is not ſufficient, *Roll.* 79. *Moor.* 451.

S. C. poſt. 288. S. C. 1. Lev. 299. S. C. Ray. 193. 205. S. C. 1. Vent. 97. 104. S. C. 2. Keb. 687. 697. S. C. Freem. 1. Salk. 382.

TWISDEN, *Juſtice.* It hath ſo been adjudged, that to lay in an information that a man is *communis oppreſſor* is not good *(a)*; and a lord cannot be *indicted* for an exceſſive diſtreſs, for it is a private matter, and the party ought to bring his *action*.—To ſtay.

214. 2. Inſt. 107. 6. Mod. 178. 289. 311. 7. Mod. 52. 1. Sid. 62. 282. Fitz. 85. 2. Hawk. P. C. 301.

(a) 1. Lev. 203. 1. Keb. 278. 1. Show. 389. Strange, 369. 849. 1246.; and ſee 2. Hawk. P. C. 322. and the caſes there cited.

Human

Caſe 26.

* Haman *againſt* Truant.

Trinity Term, 22. Car. 2. Roll 710.

On *aſſumpſit* for goods ſold, if the defendant plead a prior action on the ſame contract, the plaintiff may *traverſe* the identity of the contracts, and conclude with a verification.

AN ACTION UPON THE CASE brought upon a bargain for corn and graſs, &c. The defendant pleads another action depending for the ſame thing. The plaintiff replies, that the bargains were ſeveral; ABSQUE HOC, that the other action was brought for the ſame cauſe. The defendant *demurs ſpecially*, for that he ought to have concluded *to the country*.—POLLEXFEN. When there is an affirmative, they ought to make the next an iſſue, or otherwiſe they will plead *in infinitum*, *Huiſh v. Phillips*, *Cro. Eliz.* 755.—And accordingly judgment was given for the defendant (*a*).

S. C. 2. Keb. 692. S. C. Ray. 199. S. C. 1. Vent. 101. Co. Lit. 126. 1. Lev. 133. Cro. Car. 164. Yelv. 38. 1. Saund. 102. 2. Saund. 73. 189. 1. Ld. Ray. 263. 2. Ld. Ray. 787. 803. 2. Stra. 1177.

(*a*) The *traverſe* in this caſe was held good, becauſe it put the matter more ſingly in iſſue, S. C. 1. Vent. 101. This courſe of pleading is ſaid to be the conſtant practice, S. C. Ray. 199.; and a *reſpondeas ouſter* was awarded, S. C. 2. Keb. 692. See Carth. 300. Cro. Eliz. 754. 1. Salk. 4. 1. Sid. 383. 1. Saund. 156. 1. Burr. 316. 2. Burr. 1022. 2. Stra. 871. Dougl. 94. 429. 2. Term Rep. 439.

Caſe 27.

Foxwiſt and Others, Executors of Pinſent, *againſt* Tremain.

Where there are ſeveral executors, they may all ſue by *attorney*, though ſome of them be under age.

INDEBITATUS ASSUMPSIT. The defendant pleads, that two of the plaintiffs are infants, and yet they all ſue by attorney.

The queſtion is, If there be two executors and one of them under age, Whether the infant muſt ſue by guardian, and the other by attorney? or, Whether it is not well enough if both ſue by attorney?

OFFLEY ſpake to it, and cited *Bade v. Starkey*, *Cro. Eliz.* 542. *Cotton v. Weſton*, 1. *Rol.* 288. *Powel's Caſe*, *Style* 318. *Co. Lit.* 157. and *Dyer* 338.

S. C. ante, 47. S. C. poſt. 296. S. C. Ray. 198. S. C. 1. Sid. 449. S. C. 2. Saund. 212. S. C. 1. Vent. 102. S. C. 2. Keb. 537. 625. 633. 691. S. C. 1. Lev. 299. 2. Lev. 181. 2. Lev. 38. 239. 2. Roll. 207.

MORETON, *Juſtice*. I am of opinion that he may ſue by *attorney*, as executor; though if he be defendant he muſt appear by *guardian*.

RAINSFORD, *Juſtice*. I think it is well enough, and I am led to think ſo by the multitude of authorities in the point; and I think the caſe ſtronger when infants join in actions with perſons of full age: he ſues here *in auter droit*, and I have not heard of any authority againſt it.

TWISDEN, *Juſtice*, concurred with the reſt; and ſo judgment was given.

Moreclack

* Moreclack *againſt* Carleton. Caſe 28.

Trinity Term, 22. Car. 2. Roll 1402.

UPON A WRIT OF ERROR out of the court of common pleas, one error aſſigned was, That upon a *relictâ verificatione* a *miſericordia* was entered, whereas it ought to have been a *capiatur*.

If a *relictâ verificatione* be entered after *non eſt factum*, the defendant ſhall only be *amerced*.

TWISDEN, *Juſtice*. The common pleas ought to certify to us what the practice of their court is.

MONDAY, *the Secondary*, ſaid, It was always a *capiatur*. It is true, in the Year Book 9. *Edw.* 4. c. 24. it is ſaid, that "he "ſhall be *amerced*, becauſe he hath ſpared the jury their pains;" and the 34. *Hen.* 8. is accordingly: but, ſay they, in the common pleas a *capiatur* muſt be entered, becauſe *dicit factum ſuum*; ſo they ſaid they would diſcourſe with the Judges of the common pleas concerning it (*a*).

S. C. 2. Saund. 191. S. C. Ray. 195. S. C. 2. Keb. 688. 706. Cro. Jac. 64. 2. Ld Ray. 927. 8. Co. 60. 1. Rol. Abr. 224.

(*a*) By 16. & 17. Car. 2. c. 8. "No judgment *after verdict*, confeſſion "by *cognovit actionem*, or *relictâ verifi-"cationc*," or by 4. & 5. Ann. c. 16. "No judgment upon confeſſion, *nihil "dicit*, or *non ſum informatus*, ſhall be "reverſed for want of a *miſericordia* or "*capiatur*, or by reaſon that a *capiatur* is entered for a *miſericordia*, or a "*miſericordia* is entered where a *capiatur* "ought to have been entered, &c." And by 5. Will. & Mary, c. 12. "No writ of *capias profine* in any action "of treſpaſs, ejectment, aſſault, and "falſe impriſonment, ſhall be ſued out "or proſecuted; but the plaintiff in "every ſuch action ſhall, upon ſigning "judgment, over and above the uſual "fees pay 6s. 8d. in ſatisfaction of the "ſaid fine." THE PRACTICE therefore now is, in the court of *common pleas*, to enter, that the fine is remitted; but in the court of *king's bench* no notice is taken of any fine or *capias* at all. Salk. 54. Carth. 390. But if judgment be for the defendant, then it is conſidered that the plaintiff and his pledges of proſecuting be *nominally* amerced for his falſe ſuit, and that the defendant *eat ſine die*. See 3. Black. Comm. 399. Annally's Rep. 72.

The King *againſt* Holmes. Caſe 29.

MOVED to quaſh an indictment of forcible entry into a meſſuage, paſſage, or way, for that a paſſage or way is no land nor tenement, but *an eaſement*: and then it is not certain whether it were a paſſage over land or water, *Yelv.* 169. The word "*paſſagium*" is taken for a paſſage over water.

An indictment for a forcible entry into a *paſſage*, is bad; or into a meſſuage of which he was poſſeſſed for a certain *term*, without ſaying *of years*.

TWISDEN, *Juſtice*. You need not labour about that of the paſſage, we ſhall quaſh it as to that. But what ſay you to the meſſuage?

JONES. It is naught in the whole; for it is but by way of recital, with a *quòd cùm* he was poſſeſſed, &c. *et ſic poſſeſſionatus*, &c. —But that, TWISDEN, *Juſtice*, ſaid was well enough.

JONES. Then he ſaith, that he was poſſeſſed *de quodam termino*, and doth not ſay *annorum*.—TWISDEN, *Juſtice*. That is naught. —The indictment was quaſhed.

S. C. 2. Keb. 709. 8. Mod. 65. 11. Mod. 52. 235. 273. 12. Mod. 268. 417. 423. 495. 516. 1. Ld. Ray. 610. 3. Salk. 169.

1. Hawk. P. C. 146. 182. Salk. 260.

Barret

Caſe 30.

Barret *againſt* The Hundred of Stoak.

In an action of hue and cry againſt the hundred, poor inhabitants, though they pay no taxes, cannot be witneſs.

AN action was brought againſt the Hundred of *Stoak* upon the ſtatute of *Hue and Cry*; and at the trial ſome houſe-keepers appeared as witneſſes that lived within the hundred, who, being examined, ſaid they were poor, and paid no taxes nor pariſh duties.

The queſtion was, Whether they were good witneſſes or not?

TWISDEN, *Juſtice*. Alms-people * and ſervants are good witneſſes, but theſe are neither.—Then he went down from the bench to the Judges of the common pleas to know their opinions; and at his return ſaid, that JUDGE WYLDE was confident that they ought not to be ſworn; and that JUDGE TYRRELL doubted at firſt, but afterwards was of the ſame opinion: their reaſon was, Becauſe when the money recovered againſt the hundred ſhould come to be levied, they might be worth ſomething (*a*).

* [74]

8. C. 2. Keb. 713. 2. Saund. 2. Mod. 60. 10. Mod. 150. 292. 11. Mod. 225. 262. 1. Peer. Wms. 596. 2. Vern. 317. Prec. in Ch. 234. Abr. Eq. 223. 1. Stra. 101. 658. 2. Stra. 1253. 2. Ld. Ray. 1353.

(*a*) By 8. Geo. 2. c. 16, ſ. 15. which recites, "that by the laws no "perſons inhabiting within the hundred "can be admitted as a witneſs, by rea- "ſon of the intereſt they may have," IT IS ENACTED, "That in any action "againſt a hundred on the ſtatutes of "*hue and cry* any perſon inhabiting with- "in the ſaid hundred, or any franchiſe "thereof, ſhall be admitted as a witneſs "for or on behalf of the ſaid hundred, "in the ſame manner as if he or ſhe "were not an inhabitant thereof, but "reſided in any other hundred."—But by 22. Geo. 2. c. 24. "No perſon ſhall "recover in any ſuch action more than "200l. unleſs at the time of the robbery "there be two perſons preſent to atteſt "the truth thereof."

EASTER TERM,

The Twenty-Third of Charles the Second,

IN

The King's Bench.

Wednesday, May 10, 1671.

Sir Matthew Hale, *Knt. Chief Juſtice.*

Sir Thomas Twiſden, *Knt.*
Sir William Moreton, *Knt.*
Sir Richard Rainsford, *Knt.*
} *Juſtices.*

Sir Heneage Finch, *Knt. Attorney General.*
Sir Edward Turner, *Knt. Solicitor General.*

Memorandum.

SIR MATTHEW HALE, *Chief Baron*, was ſworn *Chief Juſtice* of the Court of King's Bench, on *Thurſday* the 18th *May* 1671, in the place of SIR JOHN KELYNGE, deceaſed. HALE appointed Chief Juſtice. Raym. 209. 2. Keb. 751.

Hopkins *againſt* Robinſon and Others. Caſe 31.

Hilary Term, 23. *Car.* 2. *Roll* 233.

REPLEVIN. In this caſe theſe points were ſpoke to by POLLEXFEN in arreſt of judgment, *viz.* A cuſtom for the tenants of a manor to have a ſole and ſeparate paſture, in excluſion of the lord, is good. S. C. 2. Saund. 324.

FIRST, Whether *a cuſtom* to have a ſeveral paſture excluding the lord were a good cuſtom or not? It was ſaid, that a preſcription to have common ſo was void in law; and if ſo, then a preſcription to have ſole paſture, which is to have the graſs by the mouth of the cattle, is no other than common appendant;

S. C. 1. Vent. 163. 123. S. C. Pollexfen, 13. to 23. S. C. 2. Lev. 2. S. C. 2. Keb. 757. 842. 1. Saund. 352. 1. Vent. 383. Cro. Jac. 27. 44. Poph. 202. 1. Lev. 296. 1. Saund. 227. 343. 2. Mod. 185. 3. Mod. 162. 250. 8. Mod. 297. Comyns, 578. 3. Peer. Wms. 257. 2. Com. Dig. 429. Dougl. 218.

Daniel's

HOPKINS *againſt* ROBINSON AND OTHERS.

Daniel's Caſe, *Cro. Car.* 542. ſo that *common* and *paſturage* is one and the ſame thing. They ſay, that it is againſt the nature of common, for the very word "common" ſuppoſeth that the lord may feed. I anſwer, If that were the reaſon, then a man could not by law claim common for half a year, excluding the lord; which may be done by law. But the true reaſon is, that if that were allowed, then the whole profits of the land might be claimed by preſcription, and ſo the whole land be preſcribed for. The lord may grant to his tenants to have common, excluding himſelf; but ſuch a common is not good by preſcription.

SAUNDERS *contra.*—In caſe of a common, ſuch a preſcription is not good, becauſe it is a contradiction, but here we claim *ſolam paſturam.* Now what may be good at this day by *grant*, may be claimed by *preſcription.*

HALE, *Chief Juſtice.* Notwithſtanding this preſcription for the ſole paſture, yet the ſoil is the lord's, and he has mines, trees, buſhes, &c. and he may dig for turfs. And ſuch a grant, *viz.* of the ſole paſturage, would be good at this day. 18. *Edw.* 3. though a grant by the lord, that he will not improve, would be a void grant at this day.

TWISDEN, *Juſtice.* LORD COKE is expreſs in the point. A man cannot preſcribe for ſole common, but may preſcribe for ſole paſture. And there is no authority againſt him. And for *levant et couchant*, it was adjudged in *Stonely v. Muckleby* (*a*), that after a verdict it was helped.

In pleading a preſcription for a ſole and ſeveral paſture, it is not neceſſary to ſay for beaſts *levant et couchant.* Ante, 6, 7. 63. Nelſ. Lut. 500, 501. 1. Sid. 313. 1. Lev. 196. 2. Lev. 2. 2. Show. 328, 329. 1. Danv. 798. 1. Saund. 27. 322. 325. 2. Saund. 2270 290. 325. 2. Shower, 328. 2. Stra. 1011. 2. Ld. Raym. 1230. 3. Term Rep. 147.

THE SECOND POINT was, Admitting that it be good, whether or no the preſcription here not being for beaſts *levant et couchant*, were good or not, for that a difference was made betwixt common in groſs and common appendant, *viz.* That a man may preſcribe for common in groſs without thoſe words, but not for common appendant. *Cro. Jac.* 256. 1. *Brownl.* 35. *Noy* 145. 15. *Edw.* 4. *fol.* 28. 32. *Roll. tit.* "*Common*" 398. *Fitz. tit.* "*Preſcription*," 51.

As to the exception, That we ought to have preſcribed for cattle *levant et couchant*; it is true, if one doth claim common for cattle, *levant et couchant* is the meaſure for the common, unleſs it be for ſo many cattle in number: but here we claim the whole herbage, which perhaps the cattle *levant et couchant* will not eat up.

(*a*) 2. Sid. 87.

A THIRD

A THIRD POINT was, Whether or no theſe things * are not helped by a verdict?—As to that, it was alledged that they are defects in the title, appearing on record; and that a verdict doth not help them (*a*).

In replevin, if a *licence* by DEED to a ſtranger to depaſture his beaſts on a ſole paſture be omitted to be ſtated, and iſſue be joined on *the cuſtom*, the omiſſion is aided by the verdict. Dougl. 683.

Judgment was given accordingly for the plaintiff.

(*a*) This objection was, admitting the tenants of the manor had, under this cuſtom, a right to *licenſe* a ſtranger to put in his cattle, that the plaintiff had not ſhewn the licence to be *by deed*; and the caſe of *Monk v. Butler*, Cro. Jac. 574. was relied on to ſhew, that the plaintiff could not maintain his action for want of title. S. C. 2. Saund. 326. But it was ſaid, that this was not laid as *a preſcription in the tenants*, but as *a cuſtom in the manor*; and therefore *title* was not neceſſary to be ſhewn. S. C. 1. Vent. 124. 164. The Court were of opinion, that ſuch *licence* could not be granted without *deed*, but that the iſſue being upon *the cuſtom*, it was aided by the verdict. S. C. 2. Saund. 328.

MICHAELMAS TERM,

The Twenty-Third of Charles the Second,

IN

The King's Bench.

Monday, 23. *October*, 1671.

Sir Matthew Hale, *Chief Juſtice.*

Sir Thomas Twiſden, *Knt.*
Sir William Moreton, *Knt.*
Sir Richard Rainsford, *Knt.*
} *Juſtices.*

Sir Heneage Finch, *Knt. Attorney General.*
Sir Edward Turner, *Knt. Solicitor General.*

Caſe 32.

To treſpaſs, a juſtification under the proceſs of an inferior court muſt ſhew *what court*, and that *the place* and *cauſe* were within its juriſdiction.
S. C. 2. Keb. 844.
6. Mod. 233.
8. Mod. 218.

Gamble *againſt* Forreſt.

AN ACTION OF TRESPASS was brought for taking away a cup, till he paid him twenty ſhillings. The defendant pleads, that *ad quandam curiam* he was amerced, and that for that the cup was taken.

HALE, *Chief Juſtice.* We cannot tell what court it is, whether it be a court-baron by grant or preſcription: if it be by grant, then it muſt be *coram ſeneſchallo*; if by preſcription, it may be *coram ſeneſchallo*, or *coram ſectatoribus*, or before both. THEN it does not appear, that the houſe where the treſpaſs was laid, was within the manor: THEN he doth not ſay *infra juriſdictionem curiæ*. —It was put upon the other ſide to ſhew cauſe (*a*).

Fitzg. 46. 85. 109. 10. Mod. 25. Salk. 404. 1. Saund. 73. 2. Ld. Ray. 1310. 2. Stra. 829. See the caſe of Rowland *v.* Veale, Cowp. 18. and Trevor *v.* Wall, 1. Term Rep. 151.

(*a*) It appears S. C. 2. Keb. 844. that judgment was given for the plaintiff.

Jacob

* Jacob Hall's Caſe. Caſe 33.

JACOB HALL, a rope-dancer, had erected a ſtage in *Lincoln's-Inn-fields*; but upon a petition of the inhabitants, there was an inhibition from *Whitehall:* now, upon a complaint to the Judges, that he had erected one at *Charing-croſs*, he was ſent for into court; and THE CHIEF JUSTICE told him, that he underſtood it was *a nuſance* to the pariſh: and ſome of the inhabitants being in court ſaid, that it did occaſion broils and fightings, and drew ſo many rogues to that place, that they loſt things out of their ſhops every afternoon.—And HALE, *Chief Juſtice*, ſaid, that in the eighth year of Charles the Firſt, NOY came into court, and prayed a writ to prohibit *a bowling-alley* erected near *St. Dunſtan's Church*, and had it (*a*).

A booth for rope-dancing erected in a ſtreet is *a nuſance*, for which the maſter and workman may be indicted; or the Judges may, upon view, order it to be abated. S. C. 2. Keb. 846. S. C. 1. Vent. 169. 2. Burr. 1232.

5. Mod. 142. 2. Roll. 109. 3. Inſt. 205. 10. Mod. 336. 12. Mod. 342. 1. Hawk. P. C. 362.

(*a*) The Judges, upon *view*, cauſed a record to be made of this *nuſance*; and ſending for the offender ordered him to enter into a recognizance not to proceed; but he refuſing to comply, the Court committed him for *the contempt*, iſſued a writ to the ſheriff, on the record made, to abate the building; and ordered him to be indicted for the offence. S. C. 1. Vent. 169.

Sir Anthony Bateman's Caſe. Caſe 34.

IN the trial at bar, the ſon and daughter of *Sir Anthony Bateman* were defendants: the action was an ejectment. The defendants admitted the point of *Sir Anthony's* bankruptcy, but ſet up a conveyance made by *Sir Anthony* to them for the payment of fifteen hundred pounds a-piece, being money given to them by their grandfather *Mr. Ruſſel*, to whom *Sir Anthony* took out adminiſtration.—HALE, *Chief Juſtice*. It is a voluntary conveyance, unleſs you can prove that *Sir Anthony* had goods in his hands of *Mr. Ruſſel's* at the time of the executing it. So they proved that he had, and there was a verdict for the defendants.

A conveyance by an adminiſtrator to the niece of the inteſtate is *fraudulent* as againſt *creditors*, unleſs it be proved that he had *aſſets* in his hands. S. C. 1. Vent. 166. Poſt. 119. 2. Lev. 70. 146. 2. Show. 46. 2. Vern. 511. Prec. in Ch. 14. 84. 275. 370. 377. 520. Abr. Eq. 148. 170. Caſ. Temp. Talb. 65. 1. Ld. Ray. 286. 725. Comyns, 255. 1. Peer. Wms. 204. 314. 3. Peer. Wms. 187. 298. Cowp. 434. 705. 2. Term Rep. 387. 2. Brown's Chan. Caſes, 90. 148.

* Legg *againſt* Richards. Caſe 35.

EJECTMENT. Judgment againſt the defendant, who dies, and his executor brings a writ of error and is nonſuited: it was moved that he ſhould pay coſts.—TWISDEN, *Juſtice*. An executor is not within the ſtatute for payment of coſts *occaſione dilationis*.—HALE, *Chief Juſtice*. I am of the ſame opinion.

An executor who brings error on a judgment againſt his teſtator ſhall not pay coſts, though the judgment be affirmed.—S. C. 1. Vent. 166. 3. Lev. 375. 4. Mod. 245. Skin. 400. Cro. Jac. 350. Cro. Car. 59. 8 Mod. 108. 11. Mod. 153. 174. 196. 256. 12. Mod. 440. 1. Peer. Wms. 482. 2. Peer. Wms. 285. 297. 496. (658.). Comyns, 162. 1. Ld. Raym. 437. 2. Ld. Raym. 865. 1413. 1. Stra. 188. 682. 2. Stra. 871. 977. 1072. 3. Peer. Wms. 181. 303. 347. 373. Barnes Notes, . Run Eject. 147. Com. Dig. "Coſts" (B.). But ſee the caſe of Williams v. Riley, 1. H. Bl. Rep. 566. that in the *common p'leas* executors and adminiſtrators are liable to coſts in error in caſes where they would be liable in the original action.

Caſe 36.

The City of London *againſt* Harwood.

The court of aldermen in London may *fine* and *impriſon* a man for marrying a *city orphan* without their conſent.

S. C. poſt. 79. S. C. 2. Keb. 847. S. C. 1. Vent. 178. S. C. 2. Lev. 32. S. C. Tremain, 420. 1. Lev. 162. 1. Ch. Rep. 26.

HARWOOD was brought to the bar by *habeas corpus*, being committed by the court of aldermen for marrying an orphan without their conſent.

NORTH, *Solicitor General.* We conceive the return inſufficient, and that it is an unreaſonable cuſtom to impoſe a penalty on a man for marrying a city orphan in any place of *England.* Now we married her far from *London*, and knew not that ſhe was an orphan. Then they have put a fine of forty pounds upon him; whereas there is no cauſe why he ſhould be denied marriage with her, there being no diſparagement.

TWISDEN, *Juſtice.* *Mr. Waller* of *Beaconsfield* was impriſoned ſix months for ſuch a thing.—So the money was ordered to be brought into court.

Caſe 37.

Leginham *againſt* Porphery.

Trinity Term, 18. *Car.* 2. *Roll* 244.

A cuſtom to commute ſuit and ſervice at the lord's court for a ſum certain is good; and a tender and refuſal of the money is equal to payment.

S. C. 2. Keb. 344. 380. 847. S. C. 1. Sid. 361.

REPLEVIN AND AVOWRY for not doing ſuit. The plaintiff ſets forth *a cuſtom*, that if any tenant live at a diſtance, if he come at *Michaelmas* and pay eight-pence to the lord and a penny to the ſteward, he ſhall be excuſed for not attending; and then ſays, that he tendered eight-pence, &c. and the lord refuſed it, &c.

POLLEXFEN. I know no caſe where payment will do, and tender and refuſal will not do.

HALE, *Chief Juſtice.* Have you averred, that there are ſufficient copyholders that live near the manor?

* [78]

S. C. 1. Vent. 167. 1. Sid. 348. 10. Mod. 26. 81. 153. 282. 12. Mod. 84. 421. 441. 530. Comyns, 116. 279. 1. Show. 129.

POLLEXFEN. We have averred, that * there are at leaſt one hundred and twenty.

HALE, *Chief Juſtice.* Surely tender and refuſal is all one with payment.

TWISDEN, *Juſtice.* An award is made, that *ſuper receptionem decem librarum* a man ſhould give a releaſe; there tender and refuſal is enough.—Judgment for the defendant (*a*).

Abr. Eq. 319. 1. Ld. Ray. 441. 686. 2. Ld. Ray. 964. 2. Peer. Wms. 378.

(*a*) Judgment was given for *the plaintiff*; for the Court were of opinion, that the cuſtom was good and well pleaded. S. C. 1. Sid. 361. S. C. 1. Vent. 167. S. C. Keb. 344. 380.

Waldron

Waldron *againſt* Roſcarriot. Caſe 38.

Hilary Term, 22. & 23. Car. 2. Roll 225.

EJECTMENT. A ſpecial verdict found a fine levied of all the conuſor's land in *A.* and that he had lands in *B.*; that a tithing-man was appointed in *B.* but that the conſtables of *A.* exerciſed their authority not only in *A.* but in *B.* alſo.

If a fine be levied of lands in *A.* and the party hath lands alſo in *B.* yet if the conſtable of *A.* is alſo conſtable of *B.* all the lands ſhall paſs. for in ſuch caſe both places conſtitute the ſame vill.

S. C. 2. Keb. 802. 821. 848. S. C. 1. Vent. 170. Ante, 13. Poph. 12. Savil, 97. 2. Show. 75. 2 Saund. 290. 2. Danv. 148. 5. Mod. 96. 127. 6. Mod. 96. 1. Salk. 175. 381.

HALE, *Chief Juſtice.* It is true, one pariſh may contain three vills: the pariſh of *A.* may contain the vills of *A. B.* and *C.* that is, when there are diſtinct conſtables in every one of them: but if the conſtable of *A.* doth run through the whole, then is the whole but one vill in law; or where there is a tithing-man it may be a vill: but if the conſtable run through the tithing, then it is all one vill. I know where three or four thouſand pounds a-year hath been enjoyed by a fine levied of land in the vill of *A.* in which are five ſeveral hamlets, in which are tithings; but the conſtable of *A.* runs through them all, and upon that it was held good for all. Here was a caſe of the conſtable of *Blandford-Forum*, wherein it was held, that if he had a concurrent juriſdiction with all the reſt of the conſtables, the fine would have paſſed the lands in all: in ſome places they have tithing-men and no conſtables.

POLLEXFEN. *Lambard*, 14. is, that the conſtable and the tithing-man are all one.

HALE, *Chief Juſtice.* That is in ſome places: *Præpoſitus* is a proper word for *a conſtable*, and *decennarius* for *a tithing-man.*

Anonymous. Caſe 39.

AN INDICTMENT for retaining a ſervant without a teſtimonial from his laſt maſter. Moved to quaſh it, FIRST, Becauſe it wants the words *contra pacem.* SECONDLY, Becauſe they do not ſhow in what trade it was.—So quaſhed.

Indictment quaſhed for want of *contra pacem.*

Cro. Car. 584. 12. Mod. 195. Fitzg. 63. 266. 2. Ld. Ray. 1116. Dougl. 445.

Anonymous. Caſe 40.

MOVED to quaſh another indictment becauſe the year of Our Lord, in the caption, was in *figures.*—HALE, *Chief Juſtice.* The year of the king is enough (*a*).

The year in the caption of an indictment muſt not be in figures, but it may be rejected as *ſurpluſage.*—1. Sid. 40. 3. Keb. 301. 2. Lev. 102. 3. Peer. Wms. 496. 1. Strange, 261. 698. 2. Strange, 865. 2. Hawk. P. C. 340. 1. Salk. 195.

(*a*) By 4. Geo. 2. c. 16. law proceedings ſhall be in *Engliſh*, and written in words at length, and not abbreviated; but by 6 Geo. 2. c. 14. ſ. 5. they may be written or printed in the like way of expreſſing *numbers* by *figures* as have been commonly uſed, and with ſuch abbreviations as are commonly uſed in the Engliſh language.

Caſe 41.

* Anonymous.

The ſpiritual court cannot enforce the payment of a rate made by the churchwardens only.

MOVED for a prohibition to the *ſpiritual court*, For that they ſue a pariſh for not paying a rate made by the churchwardens only; whereas by the law the major part of the pariſh muſt join.—TWISDEN, *Juſtice*. Perhaps no more of the pariſh will come together.—COUNSEL. If that did appear, it might be ſomething.

Poſt. 194. 5. Co. 63. 3. Term Rep. 3.

Caſe 42.

Skinner *againſt* Webb.

Error will lie to the exchequer-chamber on a *ſcire facias* in any action within 27. *Eliz.* c. 8.

HALE, *Chief Juſtice*, A writ of error will lie in the exchequer-chamber of a judgment in a *ſcire facias*, grounded upon a judgment in one of the actions mentioned in the 27. *Eliz.* c. 8. becauſe it is in effect a piece of one of the actions therein mentioned.

c. 8.—S. C. 2. Keb. 833. 842. S. C. 1. Vent. 168. Fitzg. 67. 8. Mod. 27. 10. Mod. 17, 142. 275. 281. 12. Mod. 105. 1. Ld. Ray. 97. 2. Ld. Ray. 954. 2. Stra. 1102. 1. Peer. Wms. 348. 351. 2. Term Rep. 46.

HILARY

HILARY TERM,

The Twenty-Third and Twenty-Fourth of Charles the Second,

IN

The King's Bench.

Tueſday, 23. *January*, 1672.

Sir Matthew Hale, *Knt. Chief Juſtice*,

Sir Thomas Twiſden, *Knt.*
Sir William Moreton, *Knt.*
Sir Richard Rainsford, *Knt.* } *Juſtices.*

Sir Heneage Finch, *Knt. Attorney General.*
Sir Edward Turner, *Knt. Solicitor General.*

Harwood's Caſe.

Caſe 43.

HARWOOD was removed out of *London* by *habeas corpus*; the return was, That he was fined and committed there for marrying a city-orphan without the conſent of the court of aldermen.

The court of aldermen in LONDON may impoſe a *reaſonable fine* on a perſon for marrying a *city orphan* without their conſent, altho' he be not *a freeman* and the marriage be *out of the city*;

FIRST EXCEPTION. They do not ſay that the party was a citizen, or that the marriage was within the city; and they are not bound to take notice of a city-orphan out of the city, for their cuſtoms extend only to citizens in the city.

SECOND EXCEPTION. They have not ſhewed that we had reaſonable time to ſhew cauſe why we ſhould not be fined.

and, on refuſal to pay the fine *to the court*, may commit the offender.—S. C. ante, 77. S. C. 2. Keb. 847. S. C. 1. Vent. 178. S. C. 2. Lev. 32. S. C. Tremain, 420. 1. Lev. 162. 2. Lev. 130. 1. Ch. Rep. 26. 1. Roll. Rep. 316. Co. Lit. 136. 8. Mod. 214. 9. Mod. 98. 12. Mod. 516. Abr. Eq. 261. Gilb. Eq. Rep. 172. Caſes Temp. Talb. 59. 1. Stra. 168. 1. Peer. Wms. 696. 703. 2. Peer. Wms. 102. 112. 118. 561. 3. Peer. Wms. 116. 154.

HARWOOD'S CASE.

TWISDEN, *Juſtice.* Theſe objections are over-ruled in *Mr. Waller's Caſe.*

Afterward, in the ſame Term, WESTON ſpake to it. There are two matters upon which the validity of this return doth depend, *viz.* the cuſtom; and the offence within the cuſtom.—FIRST, The cuſtom is laid, that time out of mind the court of aldermen have had power to ſet a reaſonable fine upon ſuch as ſhould marry an orphan without their leave; and upon refuſal to pay it, to impriſon him. I conceive this cuſtom, as it is laid, to be unreaſonable: it ought to be locally circumſcribed, and confined to THE CITY. 17. *Edw.* 4. 7. there was an action brought upon the ſtatute of labourers, for retaining one that was the plaintiff's retained ſervant; the defendant pleaded in abatement, that there was no place laid where the plaintiff's retainer was; and this was held a good plea; for * that if it were in another county than where the defendant retained him, it was impoſſible for the defendant to take notice of a retainer in another county: no more can we take notice who is a city-orphan in the county of *Kent.*—SECONDLY, They have returned a cuſtom to impriſon generally; but it ſhould have been, that without reaſonable cauſe ſhewn they might impriſon, and the party have liberty to ſhew cauſe to the contrary.—THIRDLY, I conceive they have returned the fact as defective as the cuſtom. They ſay, that he married her without their conſent: they ought to have ſaid, that he took her out of their cuſtody; and your lordſhips will not intend, that ſhe was in their cuſtody when ſhe was out of the city.

1. Bac. Abr. 683. 7. Viner Abr. 313.

* [80]

OFFLEY of the ſame ſide, and cited 21. *Edw.* 3. *Fitz.* "*Guard.*" 31 *Moore v. Huſſey, Hob.* 95. *The Weavers Company v. Brown, Cro. Eliz.* 803. *Dean's Caſe, Cro. Eliz.* 689. *Lander v. Brooks, Cro. Car.* 561. In all the caſes it is returned, that they were freemen of the city.

MR. SOLICITOR NORTH, on the ſame ſide, cited *Day v. Savage, Moor* 871. *Hobart* 85.

MR. ATTORNEY-GENERAL on the other ſide ſaid, That becauſe it was impoſſible to give notice to all, therefore *ex neceſſitate rei*, they muſt take notice at their peril.

HALE, *Chief Juſtice.* The city has an intereſt in the orphan, wherever the orphan be (*a*). And for notice, he may enquire; there is no impoſſibility of his coming to the knowledge, whether ſhe be an orphan or no; therefore if he take her, he takes her at his peril.

(*a*) 1. Roll Rep. 316. 1. Sid. 250. 1. Vent. 180. 3. Vern. 110.

TWISDEN, *Juſtice.* And for the fine, ſuch a fine was ſet in *Langham's Caſe*, and adjudged good (*b*). Let a citizen of *London* live where he will, his children ſhall be orphans.

(*b*) March 179.

HALE, *Chief Juſtice.* Some things are local in themſelves; ſome things adherent to the perſon, and follow the perſon: now this

1 Sid. 250. 1. Vent. 180. Hut. 30. 2. Lev. 32. 162.

this is an intereſt which follows the perſon, and is tranſmitted to his children; and the party muſt take notice of it at his peril. HARWOOD'S CASE.

* [81]

* Cox *againſt* St. Albans. Caſe 44.

A PROHIBITION was prayed for to the city of *London*, Becauſe the defendant had offered a plea to the juriſdiction ſworn, and it had been refuſed.

Prohibition ſhall not go to an inferior court, although the cauſe of action aroſe out of the juriſdiction, unleſs that matter has been tendered as a plea before imparlance, and refuſed.

HALE, *Chief Juſtice.* In tranſitory actions, if they will plead a matter that ariſeth out of the juriſdiction, and ſwear it before imparlance, and it be refuſed, a prohibition ſhall go. There was a caſe in which it was adjudged, FIRST, That upon a bare ſurmiſe that the matter ariſeth out of the juriſdiction, the court will not grant a prohibition. SECONDLY, It muſt be pleaded, and the plea ſworn, and it muſt come in before imparlance. If all this were done, we would grant a prohibition here. It was alſo agreed in that caſe, that the party ſhould never be received to aſſign for error, that it was out of the juriſdiction; but it muſt be pleaded.

S. C. 1. Vent. 180. 333. S. C. 2. Keb. 853. Ante, 63. Poſt. 273. 2. Inſt. 230. 1. Vent. 82. Vaugh. 405.

TWISDEN, *Juſtice.* So in this court, when there is a plea to the juriſdiction, as that it is within a county-palatine, they plead it before imparlance, and ſwear their plea.

Raym. 189. 1. Sid. 151. 2. Mod. 272. 9. Mod. 95. 10. Mod. 166. Fitzg. 82. 314. 2. Vern. 484. 1. Peer. Wms. 43. 476. 2. Ld. Ray. 885. 1. Salk. 202. 2. Com. Dig. "Courts" (P. 15.). Cowp. 166. Dougl. 378. 1. Term Rep. 552. 3. Term Rep. 315.

The King *againſt* Serjeant and Hannis. Caſe 45.

INDICTMENT FOR PERJURY committed in giving their evidence on the trial of an indictment for barratry. It appeared by the record that the *venire facias* for the trial of the barratry was made returnable *coram, &c. Juſtitiariis prædictis* on a day certain, *viz.* the ſixth of March.

The *venire facias* for the trial of an iſſue before juſtices of oyer and terminer, ought to be made returnable generally *at the next aſſizes*; but perjury is well aſſigned on a record ſtating a *venire* ſo returned, unleſs it be reverſed.

STROUD moved in arreſt of the judgment on the indictment for perjury:—FIRST, That the *venire* ſhould not have been returnable at a day certain, but generally *ad proximas aſſiſas*, becauſe it is uncertain when the aſſizes will begin.—SECONDLY, That being made returnable *coram Juſtitiariis prædictis*, none but the ſame Juſtices could proceed.

TWISDEN, *Juſtice.* There was a *venire facias* returnable *coram nobis apud Weſtm.* whereas it ſhould have been *ubicunque fuerimus, &c.* yet becauſe the court was held here, it was held to be good.

S. C. 1. Vent. 181. S. C. 2. Keb. 505. 718. 854. Dyer, 262. Cro. Jac. 314. Cro. Car. 254. 2. Danv. 151. 2. Mod. 59. 11. Mod. 86.

HALE, *Chief Juſtice.* I remember it. When in an inferior court the *venire facias* is *ad proximam curiam*, it is naught, becauſe it is uncertain when the court will be kept. But if it be at ſuch a day *ad proximam curiam* it is good (*a*).

1. Stra. 146. 560. 2. Ld. Raym. 854.

(*a*) See Cowp. 18.

THE

THE KING *againſt* SERJEANT AND HANNIS.

THE COURT held, that the firſt exception made the record erroneous, but that as it was unreverſed, the perjury was well aſſigned; and that the ſecond was aided by the 1. & 2. *Edw.* 6. c. 7.

Caſe 46.

Hall *againſt* Clarke.

The acts of a court muſt be in the *preſent tenſe*, but thoſe of the party may be in the *preterperfect*.

A WRIT OF ERROR of a judgment in *Whitechapel*. After the record was read, HALE, *Chief Juſtice*, ſaid, the acts of a court ought to be in the preſent tenſe; as "*præceptum eſt*," not "*præceptum fuit*:" but the acts of the party may be in the preterperfect tenſe; as *venit et protulit hic in curiâ quandam querelam ſuam*; and the continuances are in the preterperfect tenſe; as "*venerunt*," not "*veniunt*."—But upon another exception THE COURT gave time to move it again.

2. Keb. 846. 861. 2. Saund. 393. 1. Stra 608. Ld. Ray. 1347. Cowp. 29.

* [82]

Caſe 47.

* The King *againſt* Stanlake.

On proof made of corrupt practice in a coroner on an inquiſition *ſuper viſum corporis*, the Court will quaſh the writ, and grant a *melius inquirendum*.

SIR EDWARD THURLAND moved for a *melius inquirendum* to be granted to the coroner of *Kent*, who had returned an inquiſition concerning the death of one who was killed within the manor of *Greenwich*: he had returned, that he died of *a meagrim* in his head, when he was really killed with a coach.

S.C. 1. Vent. 181. S.C. 2. Keb. 859. 22. Edw. 4. pl. 4. Co. 57. Cro. Eliz. 371. Carth. 72. 3. Mod. 80. 238. 2. Hale, 59. 1. Hawk. P. C. 104. Salk. 380. 2. Hawk. P. C. 88. 1. Hale, 415. 2. Hale, 60. 69. Strange, 69.

HALE, *Chief Juſtice*. A *melius inquirendum* is generally upon an office *poſt mortem*, and is directed to the ſheriff.

TWISDEN, *Juſtice*. But this cannot be to the ſheriff; for the coroner muſt enquire only *ſuper viſum corporis* (*a*). And if you will have a new enquiry, you muſt quaſh this. Indeed a new enquiry was granted in *Miles Bartly's Caſe* (*b*).

THURLAND prayed, That THE COURT, being the ſupreme coroner, would examine the miſdemeanour of the coroner (*c*).

HALE, *Chief Juſtice*. Make ſome oath of his miſdemeanor, becauſe he is a ſworn officer. Without oath we will not quaſh this inquiſition (*d*).

NEWDIGATE ſaid, That in the caſe of *Miles Bartly* the enquiry was not filed; and that that was the reaſon why a new one was granted.

HALE, *Chief Juſtice*. Let the coroner attend; he muſt take the evidence in writing; and he ſhould bring his examination into court (*e*).

(*a*) See the ſtatute 4 Edw. 1. De Officio Coronatoris, and the 25. Geo. 2. c. 29. 2. Hawk. P. C. 74. 85.

(*b*) 2. Sid. 90. 101. 143.

(*c*) 1. Hale, 52. 4. Co. 57. 1. Bl. Com. 348.

(*d*) Strange, 22. 167. 533. Salk. 377. 2. Hawk. P. C. 78.; and the ſtatute 3. Hen. 7. c. 1. 1. Hen. 8. c. 7. and 25. Geo. 2. c. 29.

(*e*) See the ſtatute 1. & 2. Phil. & Mary, c. 13.

Daniel

Daniel Appleford's Caſe.

A WRIT OF MANDAMUS was directed to the maſter and fellows of *New College* in *Oxford*, to reſtore one *Daniel Appleford*, a fellow. They return, That the *Biſhop of Wincheſter* did erect the college; and among other laws by which the college was to be governed, they return this to be one, *viz.* "That if a ſcholar, or "other member of the ſaid college, ſhall commit any crime where- "by ſcandal may ariſe to the college; and it appear by his own "confeſſion, or full evidence of the fact, that then he ſhall be re- "moved without any remedy:" and that *Daniel Appleford*, a fellow, was guilty of enormous crimes, and was convicted, and thereupon removed: and they pray judgment, whether this Court will proceed.

A writ of *mandamus* will not lie *to reſtore* a fellow of *New College* in *Oxford*, who has been removed by *the Viſitor* appointed by *the Founder* of the College.

S. C. 2. Keb. 799. 861. 2. Lev. 14. 1. Lev. 23. 65. Raym. 56. 94. 101. 1. Sid. 29. 94. 71. 152. 346.

* [83]

1. Show. 74. Carth. 168. 2. Jones, 175. 8. Mod. 27. 148. 10. Mod. 50. 12. Mod. 2. 113. 190. 609. 666. Fitzg. 123. 194. 1. Ld. Ray. 7. 2. Ld. Ray. 1334. 1348. 1. Stra. 557. 1. Peer. Wms. 47. 348. 351. 1. Burr. 195. 2. Burr. 1044. 1. Wilſ. 129. 206. Cowp. 377. 1. Term Rep. 290. to 346. 2. Term Rep. 354. 3. Term Rep. 575. 4. Term Rep. 233.

JONES. By this concluſion they rely chiefly upon the juriſdiction of the Court. I will lay this for a ground, that this Court hath juriſdiction in extrajudicial cauſes as well as judicial, 11. *Co. Bagg's Caſe*, and * *Appleford* hath no remedy but this: I will not ſay that he may not have an action upon the caſe, but by that he will not recover the thing, but damages. As for an aſſiſe, if a man be a corporation ſole or head of a corporation aggregate, and be turned out wrongfully, he may have an aſſiſe; but for a man that is but an inferior member of a corporation, no aſſiſe lieth for him, becauſe he is but a part of the body politic, and doth not ſtand by himſelf but muſt join with others; and as he cannot have an aſſiſe, ſo he cannot have an appeal: *Dyer*, 209. and 11. *Rep. Bagg's Caſe*. 24. *Hen.* 8. *pl.* 22. 25. *Hen.* 8. c. 19. 4. *Inſt.* 340. By theſe authorities it appears that we are without remedy by way of appeal *(a)*. It may be objected, that there can be no appeal hither, becauſe it is a ſpiritual corporation. Now I ſay, this is not a ſpiritual corporation, as appears by the foundation; and I am of opinion, that if a corporation be all of ſpiritual perſons, yet unleſs there be a ſpiritual end, it is no ſpiritual corporation but a lay one: but if it be a ſpiritual corporation, yet deprivation is a temporal act; *Dyer* 209. Another objection may be, that the founder hath provided that there ſhall be no appeal. I anſwer, the founder cannot by his foundation exclude legal remedies againſt wrong: a cuſtom, which is the ſtrongeſt foundation, doth not bind a man up from his legal remedy; *Lit. Sect.* 212. If a man ſhould diſpoſe of his eſtate by will, and provide therein, that if any difference ſhould ariſe concerning the execution of the ſame, that it ſhall be determined by ſuch and ſuch, and no ſuit commenced upon it at the common law, this would be a vain appointment: he muſt not erect a juriſdiction of his own to ouſt the king's courts of theirs *(b)*.

(*a*) But ſee, as to this point of *Bagg's Caſe*, the argument of HOLT, *Chief Juſtice*, in the caſe of *Philip v. Bury*, 1. *Ld. Ray.* 5. as reported 2. Term Rep. 355. from his lordſhip's own original manuſcript. See alſo 1. Ld. Ray. 9. 1. Term Rep. 396.

(*b*) See *Kill v. Hollifter*, 1. Wilſ. 129.

COLEMAN,

DANIEL APPLEFORD'S CASE.

COLEMAN, *contra*. I conceive this is such a college as no *mandamus* should go to it in any case whatsoever; for it is but a private society, and hath no influence upon the public. In *Rily's Records* we find that *mandamus*'s were only letters to colleges, &c. and there were no judicial *mandamus*'s till *Bagg's Case*; and I never knew them go but when the party had not only a freehold, but one that was of public concern: now a fellowship of a college is for a private design only to study; and if you grant *a mandamus* in this case, whither will it go at last? Then the foundation was to a spiritual intent; and what is committed to the ecclesiastical power and jurisdiction this Court doth preserve. Ecclesiastical men hold *in elecmosynam: Litt. Sect.* 136. * *Lindewode de Religiosis Domibus.* When colleges are founded under rule and order, it doth give the bishop jurisdiction; so that this Court will not enquire into this matter, no more than it will enquire into causes of deprivation, and matters relating to the institution of clergymen. It hath been denied, that a fellow of a college can bring an assise: but as a prebend hath two capacities, sole and aggregate; so a fellow is a member of a corporation aggregate, and hath a sole capacity in respect of his fellowship: for a churchwarden who is admitted according to the course of the ecclesiastical law, a *mandamus* will not lie. *Vide* 6. *Hen.* 7. *pl.* 10.

2. Sid. 29.

* [84]

2. Roll. 234.

TWISDEN, *Justice*, In one *Patrick's Case* (*a*) we all held, that a college was a temporal corporation.

HALE, *Chief Justice*. There is a reason given in *Dyer* why a *mandamus* will not lie in the case there, *viz.* Because it was prayed to be awarded to a temporal corporation.

COLEMAN. It doth appear by the return, that *the founder* hath appointed *a visitor*: now to him there may be an appeal, and we have returned the sentence of the visitor, and need not return the cause of the sentence: and for books I oppose *Huntly's Case* (*b*) to *Specott's Case* (*c*) and *Ken's Case* (*d*). In our case the party has a remedy elsewhere, and therefore he shall not come hither. If a *mandamus* shall lie for a mastership, fellowship, or scholarship, it will in time come to lie for turning out of commons; and what a combustion will this raise then? The niceties of husband and wife were said by the Judges in *Scott's Case* (*e*) to be proper for the spiritual court, and not fit to be brought before the Judges.

1. Ld. Ray. 8. 1. Wilf. 206. 1. Burr. 200. Cowp. 322.

HALE, *Chief Justice*. That a *mandamus* lies, I will not positively deny; but whether is it fit for us to proceed after this return? It must be taken for granted, that it is not a spiritual cor-

(*a*) Raym. 101 1. Lev. 65. 1. Sid. 3. Leon. 198. 1. Ander. 189. Gould. 346. 1. Keb. 287. 294. 298. 551. 35. Jenk. 258.
610. 665. 835. 2. Keb. 65. 164. 259. (*d*) 7. Co. 42. Cro. Jac. 186.
(*b*) 2. Roll. Abr. 209. (*e*) Manby *v.* Scott, post. page 124.
(*c*) 2. Roll. Abr. 255. 5. Co. 57.

poration;

poration; if it were, you ought to appeal to *the viſitor*, and then to *the delegates*. It is a private ſociety, as an inn of court (*a*); and I confeſs, that *mandamus*'s do generally reſpect matters of public concern. I never heard of a *mandamus* for *a monk*. If there be a juriſdiction in the viſitor, and he hath determined the matter, how will you get over that ſentence? The chancellor is viſitor of all the king's free chapels, and the 2. *Hen.* 5. c. doth make him ſo of all colleges of the king's foundation. Suppoſe a temporal court over which we have juriſdiction do give judgment in aſſiſe to recover an office; ſo long as that judgment ſtands in force, do you * think that we will grant a *mandamus* to reſtore him againſt whom the judgment is given?

* [85]

TWISDEN, *Juſtice*. In all eleemoſynary things there are viſitors appointed either by law, or by creation of the party.

HALE, *Chief Juſtice*. The free-chapels of *Windſor* and *Wolverhampton* are not of ſpiritual juriſdiction. At this rate we ſhould examine all deprivations, ſuſpenſions, elections, &c. and by the 13. *Eliz.* c. 29. the laws of the Univerſity are confirmed. We ought not to grant *a mandamus* where there is *a viſitor*: but in this caſe the viſitor hath given ſentence.

(*a*) See Rex v. Gray's Inn, Dougl. 353.

Mors *againſt* Sluce.

Caſe 49.

Michaelmas Term, 23. *Car.* 2. *Roll.* 421.

A TRIAL AT BAR. An action upon the caſe was brought againſt a maſter of a ſhip, who had taken in goods to tranſport them beyond ſea, For that he ſo negligently kept them, that they were ſtolen away whilſt the ſhip lay in the river of *Thames*.

An action on the caſe lies againſt the *maſter of a ſhip* to recover the value of goods which he hath received upon freight, on their being ſtolen by open force and violence from on board the ſhip while lying in the river Thames.

MAYNARD inſiſted upon it, That the maſter was not chargeable. Say they, He is chargeable whilſt he is here; but when he is gone out of the realm, he is not chargeable, though the goods be taken from him. This diſtinction, he ſaid, had no foundation in law.

HALE, *Chief Juſtice*. It will lie upon you that are for the defendants, to ſhew a difference betwixt a carrier and a maſter of a ſhip. And it will lie upon you that are for the plaintiff, to ſhew why the maſter of a ſhip ſhould be charged for a robbery committed within the realm, and not for a piracy committed at ſea.

S. C. 3. Keb. 72. 112. 135. S. C. 1. Vent. 190. 238. S. C. Ray 220. S. C. 2. Lev. 69.

It was urged by MR. HOLT *for the plaintiff*, that a hoy-man, and ferry-man are bound to anſwer, and why not the maſter of a ſhip?

S. C. 2. Keb. 866. 1. Danv. 12. Molloy, 209. 230. 239. 1. Roll. Abr. 2. 1. Sid. 36. 3. Mod. 178. 11. Mod. 135. 12. Mod. 6. 472. 482. 2. Ld. Raym. 918. S. C. cited, and ſaid to be the firſt caſe adjudged as to the *maſter of a ſhip*, Cowp. 762.

The

Mors *againſt* Sluce.

The defendant proved, that there was no careleſſneſs nor negligent default in him.

MAYNARD. He is not chargeable, if there be no negligence in him, becauſe he is but a ſervant; the owner takes the freight.

HALE, *Chief Juſtice.* He is *exercitor navis.* If we ſhould let looſe the maſter, the merchant would not be ſecure. And if we ſhould be too quick upon him, it might diſcourage all maſters; ſo that the conſequence of this caſe is great.

But THE JURY gave a verdict for the defendant; THE COURT, for the reaſons aforeſaid, inclining that way *(a)*.

(*a*) It appears that *a ſpecial verdict* was found in this caſe, the material facts of which were, "that the ſhip lay within "the body of a county; that a ſufficient "number of men were kept on board "to attend her; and that the maſter "was to have wages from the owners, "and the mariners from the maſter." It was twice argued; and in Hilary Term, 25. *Car.* 2. HALE, *Chief Juſtice*, delivered the unanimous opinion of the Court in favour of *the plaintiff*: Firſt, Becauſe the ſhip being *infra corpus comitatûs*, the maſter could not avail himſelf of the rules of the civil law, by which maſters are not chargeable *pro damno fatali*. Secondly, That he is liable, becauſe he takes a reward in receiving the wages. Thirdly, Becauſe he received the goods generally. Fourthly, Becauſe there is no difference between a *maſter of a ſhip* and *a common boy-man*. See the ſame caſes *in marg.* But by the 7. Geo. 2. c. 15. "No *owner* of any ſhip ſhall be "liable to make good any loſs or "damage by reaſon of any embezzle-"ment by the maſter or mariners, or "any of them, of any goods on ſhip-"board, beyond the value of the ſhip "and freight of the cargo."—See Sutton *v.* Mitchel, 1. Term Rep. 18.; Froward *v.* Pitard, 1. Term Rep. 27.; and the caſe of Barclay *v.* Higgins, there cited, page 33.

*[86]

Caſe 50.

* Williams, on the Demiſe of Porter, *againſt* Fry.

Michaelmas Term, 22. Car. 2. Roll 392.

If a deviſe be made to *A.* for life, with remainder to *B.* and the heirs of his body, upon *condition* if *B.* marry without the conſent of *C.* then the eſtate ſhall go to *D.*; this is a *limitation*, and not a *condition*; and if *B.* marry without the conſent of *C.* the remainder-man may enter; for it is a forfeiture, although *B.* has no notice of the limitation previous to his marriage.—S. C. poſt. 300. S. C. 1. Freem. 31. S. C. 1. Vent. 199. S. C. Ray. 236. S. C. 2. Lev. 21. S. C. 2. Keb. 756. 787. 814. 867. S. C. 3. Keb. 19. S. C. 1. Eq. Abr. 111. S. C. 1. Ch. Caſes, 138. S. C. 2. Ch. Rep. 26. 2. Show. 316. 2. Danv. 30. 111. Cro. Car. 583. Gouldſb. 153. 1. Leon. 269. 3. Co. 19. Cro. Jac. 510. 2. Bulſt. 123. 2. Roll. Rep. 223. 427. Co. Lit. 380. Prec. in Ch. 350. 1. Wilſ. 130. 135. 159. Ambl. 256. 2. Com. Dig. 475. 3. Bac. Abr. 23.

EJECTMENT. On a ſpecial verdict, the caſe was, A man deviſeth to *A.* for life, the remainder to one and the heirs of his body, upon condition, that if he marry without conſent of ſuch and ſuch, or die without heirs of the body of his mother, that then the eſtate ſhall go to another and his heirs. The deviſee marries without their conſent, and he in the remainder enters.

FINCH, *Attorney-General.* The FIRST queſtion will be, Whether this PROVISO be *a condition* or *a limitation?*—SECONDLY, Whether notice be requiſite in this caſe or not?

For THE FIRST, I take it to be a limitation, and that it muſt ſo be expounded, and not as a condition, as in the caſes of *Wilford v.*

Wilford;

Wilford (*a*); in *Scholaſtica's Caſe* (*b*); in *Plowden's Queries* (*c*); in *Engleſield's Caſe* (*d*); in *Jennour v. Hardy* (*e*); in *Gibbons v. Wallyard* (*f*); in *Wiſeman v. Baldwin* (*g*); and the ſame caſe in *Owen's Reports* (*h*), that in caſe of a deviſe, a condition muſt be conſtrued as a limitation. There ſeems, indeed, to be an authority againſt me in *Mary Portington's Caſe* (*i*), in a reaſon there given; but it is an accumulative reaſon, and does not come to the point adjudged. I ſhall inſiſt upon *Wellock v. Hamond*, as reported in *Leonard* (*k*), and as it is reported likewiſe in *Boraſton's Caſe* (*l*); and LORD COKE ſays, that it doth reſolve a *quære* in *Dyer* 317. ſo that expreſs words of condition may, by conſtruction in a will, amount to no more than a limitation.

THE SECOND POINT is, Whether he ſhall be excuſed for breach of this condition for want of notice? And I ſhall conſider it in reſpect of the perſon; and in reſpect of the grounds of notice in any caſe.

FIRST, in reſpect of the perſon. Now he may be conſidered in two capacities, as *an infant*, and as *a deviſee*: now his infancy cannot excuſe him; for the condition was annexed to the deviſe expreſsly; becauſe he was an infant.—SECONDLY, He is a purchaſor. Now if an infant purchaſe an advowſon, and the incumbent die, lapſe ſhall incur, though he had notice of the death of the incumbent; and there is the ſame reaſon in this caſe, where he is deviſee.—THIRDLY, An infant is bound by all conditions in deed, though not by conditions in law, as appears in the caſe of *Winbolt v. Tailbury* (*m*). Indeed 31. *Aſſize* 17. is againſt it; but in *Brooke's Abridgment* (*n*) * that caſe is ſaid to be no law, and *Brooke* agreeth with *Plowden* in the caſe of *Stowel v. Zouch* (*o*). * [87]

SECONDLY, Conſider him as deviſee, and then there will be leſs ground to excuſe the want of notice. I take it to be a good difference betwixt lands deviſed to an heir upon condition, and lands deviſed to a ſtranger upon condition. To the heir notice muſt be given, but not to a ſtranger: for the heir is in by deſcent, and a title by law caſt upon him: and he may very well be ſuppoſed to take no notice of a deviſe, becauſe the law takes no notice of a deviſe to him. Now a ſtranger, as he muſt needs take notice of the eſtate given, ſo he may very well be obliged to take notice of the terms upon which it is given. 4. *Co.* 82. As for the grounds and reaſons of the law, when notice in any caſe is requiſite, and when not—FIRST, I take it for a rule, that every man is bound to take notice, when none is bound to give him notice: 1. *Hen.* 7

2. Show. 316. 1. Jones, 389. 1. Ro. Rep. 469. Winch. 109. 117. Palm. 73. 164. Carth. 92. 170, &c. 2. Danv. 111. 8. Co. 92. Cro. Car. 577. 2. Roll. Rep. 152. 1. And. 86.

(*a*) Dyer, 128. a.
(*b*) Plowd. 403.
(*c*) Quære 108.
(*d*) Moor, 303. 312.
(*e*) 1. Leon. 283.
(*f*) Poph. 6.
(*g*) 1. Roll. Abr. 411.
(*h*) Owen, 112.
(*i*) 10. Co. 36.
(*k*) 1. Leon. 269.
(*l*) 3. Co. 19, 20. Cro. Eliz. 204.
(*m*) Plowd. 57.
(*n*) Tit. "Condition," pl. 114.
(*o*) Plowd. 375.

WILLIAMS *againſt* FRY.

pl. 5. 13. *Hen.* 7. *pl.* 9. *Sir Henry Conſtable's Caſe* (*a*); *Burleigh's Caſe* (*b*), in the exchequer; and 1. *Cro.* 390. *Roll.* 856. *Litt. Sect.* 350.—SECONDLY, That where perſons are equally privy and concerned, there needs no notice, as in *Leviſton's Caſe* (*c*); *Mallorie's Caſe* (*d*); and 14. *Hen.* 7. *pl.* 21.—The THIRD conſideration ariſeth from the circumſtances, and ſtrict formality of all notice. You muſt not give notice of a will by word of mouth, but you muſt leave a copy of it compared: *Fraunce's Caſe* (*e*). Now the infant in remainder is incapable of obſerving theſe circumſtances: and they being both ſtrangers, are both to take notice at their peril.

8. Co. 90.
1. Roll. Rep. 340.
2. Brownl. 277.
3. Bulſt. 327.
Cart. 172.

Now to anſwer objections. One is, that the condition is penal, and inflicts a forfeiture of an eſtate, and that therefore notice ought to be given. I ſay, this is rather a declamation, than an argument in law. I will put a caſe, where he that is ſubject to a penalty, muſt give notice to preſerve himſelf, *Popb.* 10. ſo that penalty or no penalty, is not the buſineſs; but privity or no privity guides the caſe. And *Fraunce's Caſe* was ruled upon the privity, not upon the penalty. The caſe of *Curtis v. Woolverſton* (*f*), and a caſe adjudged in this court, *Lee v. Chamberlyne*, ſeem againſt me; but they differ from ours; and the caſe of *Alford v. the* * *Commonalty of London* (*g*), is an authority for me.

* [88]

Cro. Car. 577.
2. Danv. 8, 9.
10. 10. Co. 36, 37, &c.

MR. SOLICITOR NORTH, *for the defendant.* I will not ſpeak much to that point, whether it be a *condition*, or a *limitation*. I ſhall rely for that upon *Mary Portington's Caſe*, that expreſs words of condition cannot be conſtrued to be a limitation. *Dyer* 127. Now, if this be a condition, then the heir regularly ought to enter; which he cannot do in this caſe, becauſe a remainder is here limited over. The law does interpret conditions according to the nature and circumſtances of the thing, and not ſtrictly always according to the letter. I do not obſerve, that in any caſe the law ſuffers a man to incur a forfeiture, where he hath not notice, or is not in law ſuppoſed to have notice; and he cited the caſe of *Molyneux v. Molyneux* (*h*), and *Fraunce's Caſe* (*i*). He ſaid it was not the intention of the party, that the deviſee ſhould be ſtripped of his eſtate, and be never the wiſer. The caſe of *Saunders v. Gerard* (*k*) is for me, of which I have a private report. He urged alſo the caſe of *Curtis v. Woolverſton* (*l*); and *Pennant's Caſe* (*m*).

8. Co. 90, 91.
1. Roll. 340.
3. Bulſt. 327.
Vide Cart. 172.

3. Co. 64, 65.
2. And. 90.
Cro. Eliz 553. 572. Moor, 426. 456.

It is objected, that they that are to have the benefit of the eſtate ought to take notice.—I anſwer, The ſame objection might be

(*a*) 5. Co. 106.
(*b*) 3. Leon.
(*c*) 1. Leon. 314.
(*d*) 7. Co. 117.
(*e*) 8 Co. 92.
(*f*) Cro. Jac. 57.
(*g*) Cro. Car. 577. 1. Jones, 452.
(*h*) Cro. Jac. 144.
(*i*) 8. Co. 90.
(*k*)
(*l*) Dyer, 354. Cro. Jac. 56.
(*m*) 5. Co. 64. Moor, 456. Cro. Eliz. 553. 572.

made

made in *Fraunce's Caſe*. Another reaſon given to excuſe the not giving of notice is, That the condition imports no more than nature teacheth: But I anſwer, in caſe the executor conſent, it is no matter whether the grandmother conſent or not. And for their authorities, I ſhall rely upon the caſe of *Gimblet v. Sands* (*a*); and upon *Fraunce's Caſe* for anſwering them. So he prayed judgment for the defendant.

WILLIAMS *againſt* FRY.

8. Co. 90. 1. Rol. 340. 2. Brownl. 277. 3. Bulſt. 327. Carth. 172. Poſt. 300, 301, &c.

HALE, *Chief Juſtice*. All the difference betwixt this caſe and *Fraunce's Caſe* is, that in that caſe there is an heir at law, and not in this. Now the chancery is ſo juſt, as to obſerve the civil and canon law as to perſonal legacies, but not as to land (*b*).

(*a*) Cro. Car. 392.

(*b*) The whole Court were of opinion on the firſt point, that it was a *limitation*, and not a *condition*; and on the ſecond point, that *notice* was not neceſſary. Judgment therefore was given for the plaintiff. S. C. Ray. 237. 1. Freem. 32. 2. Lev. 22. 1. Vent. 205. and 3. Keb. 23. The defendants brought a bill in equity for relief, which was diſmiſſed. Poſt. 300. 1. Chan. Caſes, 138. 2. Ch. Rep. 26. 1. Eq. Abr. 111.

* Buckler *againſt* Moor.

Caſe 51.

AN ACTION UPON THE CASE was brought upon a promiſe to pay money three months after upon a bill of exchange; to which the defendant pleads, *non aſſumpſit infra ſex annos*.

To an action upon an *executory promiſe* the defendant cannot plead *non aſſumpſit infra ſex annos*.

It was urged, that as this promiſe was laid he ought to have pleaded, that the cauſe of action did not accrue within ſix years.

SYMPSON. *Non aſſumpſit infra ſex annos* relates to the time of payment as well as to the promiſe.

S. C. 2. Keb. 874. S. C. 1. Freem. 22. Ante, 71. 89. 8. Mod. 109. 9. Mod. 32. 10. Mod. 104. 205. 294. 1. Vent. 191. Salk. 422.

HALE, *Chief Juſtice*. That cannot be.

TWISDEN, *Juſtice*. If I promiſe to do a thing upon requeſt, and the promiſe were made ſeven years ago, and the requeſt yeſterday, I cannot plead the ſtatute; but if the requeſt were ſix years ago, it muſt be pleaded ſpecially, *viz.* that *cauſa actionis* was above ſix years ſince.

Fitzg. 81. 170. 289. 2. Ld. Ray. 838. 3. Atk. 71. Burr. 1281. Gilb. Evid. 477.

Bradcat *againſt* Tower.

Caſe 52.

AN ACTION was brought upon a charter-party; and HALE, *Chief Juſtice*, in that caſe ſaid, that upon *a penalty* you need not make a demand, as in caſe of a *nomine pœnæ*: as if I bind myſelf to pay twenty pounds on ſuch a day, and in default thereof to pay forty pounds, the forty pounds muſt be paid without any demand.

Demand of performance is not neceſſary on a covenant to pay a penalty on default.

7. Co. 28. 1. Saund. 33.

Cro. Eliz. 383. 2. Danv. 100. pl. 4. 10. Mod. 38. 396. 12. Mod. 413. Dougl. 483.

Caſe 53. Emmerſon, Executor of Fiſher, *againſt* Anniſon.

Trinity Term, 23. Car. 2. Roll 1389.

Treſpaſs.
1. Hale P. C. 510.
3. Inſt. 109.
S. C. 2. Keb. 874. S. C. 1. Vent. 187. 2. Stra. 1133. See 2. Bac. Abr. 470. 1. Hawk. P. C. 142. and 4. Black. Com. 233. for an explanation of the principles upon which this diſtinction is founded.

HALE, *Chief Juſtice.* If a man cut and carry away corn at the ſame time, it is *treſpaſs* only and not *felony*, becauſe it is but one act; but if he cut it and lay it by, and carry it away afterwards, it is felony *(a)*.

(a) By 27. *Eliz.* c. 7. to cut or take away corn growing is a miſdemeanor.

Caſe 54. Marſhal *againſt* Ditchin.

Hilary Term, 22. & 23. Car. 2. Roll 732.

In treſpaſs, if the place WHERE is not named, the defendant may ſtate another time, and put the plaintiff to *a new aſſignment*.—S. C. 2. Keb. 860. Hob. 16. 1. Cro. 228. 1. Term Rep. 479. 2. Term Rep. 272. 3. Term Rep. 292. 4. Term Rep. 157.

HALE, *Chief Juſtice.* If a declaration be general, *quare clauſum fregit*, and doth not expreſs what cloſe, there the defendant may mention the treſpaſs at another day, and put the plaintiff to a *new aſſignment*; but if he ſay, *quare clauſum vocat.* DALE *fregit, &c.* there the concluſion, *quæ eſt eadem tranſgreſſio*, will not help.

* [90]

Caſe 55. * Fitzgerald *againſt* Marſhall.

An ejectment for *corn mills*, without ſaying what *kinds*; and 100 acres *of heath and furze*, without ſaying *how many of each*; is good after verdict.
S. C. 1. Vent. 206.
S. C. 3. Keb. 44.
Hard. 59.
Cro. Car. 179. 471. 573. 1. Jones, 454. 2. Danv. 755. 1. Lev. 58. 114. 213. 3. Lev. 96. 11. Co. 55. 4. Co. 87. 8. Mod. 277. 1. Stra. 54. 71. 695. 2. Stra. 834. 1063. 1084. 2. Ld. Ray. 789. 1. Burr. 623. Run. Eject. 33. 1. Term Rep. 11.

ERROR of a judgment in the king's bench in *Ireland (a)*: the general error aſſigned. Offered FIRST, That the ejectment was brought *de quatuor molendinis*, without expreſſing whether they were *wind-mills* or *water-mills*.

HALE, *Chief Juſtice.* That is well enough. The precedents in THE REGISTER are ſo.

SECONDLY, That it was of ſo many acres *jampnor. et brueria*, not expreſſing how many of each.—PER CURIAM. That hath always been held good.

It was then objected, That the record was not removed.—Upon which it was ordered to ſtay.

(a) See 22. Geo. 3. c. 28. and 23. Geo. 3. c. 53. by which appeals from Ireland to the courts in England are aboliſhed.

Allane *againſt* Exton.

Caſe 56.

PEMBERTON moved for a prohibition to the ſpiritual court, For that they cited the miniſter of *Marybone*, which is *a donative*, to take a faculty of preaching from the biſhop.

The ſpiritual court may cite the miniſter of *a donative* to take *a faculty for preaching* from the biſhop.

S. C. 2. Keb. 876.
Ante, 11. 22.
Fitzg. 165. 189. 272.
2. Ld. Ray. 1205. 1507.
2. Stra. 715.
1. Peer. Wms. 47. 301. 657. 774.
3. Peer. Wms. 337.

HALE, *Chief Juſtice.* If the biſhop go about to viſit *a donative*, this Court will grant a prohibition; but if all the pretence be, that it is a chapel and the chaplain hired, and the biſhop ſend to him that he muſt not preach without licence, it may be otherwiſe.

TWISDEN, *Juſtice.* FITZHERBERT ſaith, If a chaplain of the king's free chapel keep a concubine, the biſhop ſhall not viſit, but the king.

HALE, *Chief Juſtice.* Indeed, whether there be all ornaments requiſite for a church, the biſhop ſhall not enquire, nor ſhall he puniſh for not repairing. Originally free chapels were colleges, and ſome did belong to the king, and ſome to private men: and in ſuch a chapel, he that was in was entitled as *incumbent*, and not *a ſtipendiary*.—Ordered to hear counſel (*a*).

(*a*) It is ſaid, S. C. 2. Keb. 876. that the prohibition was denied, becauſe it appeared to be not *a free chapel*, but a *private chapel*, and the miniſter a *ſtipendiary curate* ſet up by the *impropriator*. See Degge Parſ. c. 12. Lindw. 233. Gibſon, 212. See alſo a conſtitution by archbiſhop Stratford, 1. Burn's Ec. Law, 273. and the Preface to Tanner's Notit. Monaſt. page 28. Co. Lit. 344. Yelv. 61. 1. Sid. 432. Ld. Ray. 1205. 3. Wilſ. 345. and 2d vol. Burn's Ec. Law, title "Donative." And in the caſe of Powell *v.* Melburn, 3. Wilſ. 361. it is ſaid by DE GREY, *Chief Juſtice*, that no ſuch licence for preaching is neceſſary to be had by the miniſter of a donative with cure of ſouls, but that it is only neceſſary in the caſe of lecturers. See alſo Campbel *v.* Aldrich, 2. Wilſ. 79. Rex *v.* Biſhop of Cheſter, 1. Term Rep. 404.

Stroud's Caſe.

Caſe 57.

STROUD moved for a prohibition to the biſhop's court of *Exeter*, Becauſe they proceeded to the probate of a will that contained *deviſes of lands*, as well as bequeſts of *perſonal things*.

An intire will, though of *land* as well as *goods*, may be proved in *prerogative court*.

S. C. 2. Keb. 838. 876.
1. Vent. 207.
Hard. 1.

HALE, *Chief Juſtice.* Their proving the will ſignifies nothing as to the land.—STROUD urged *Denton's Caſe*, and ſome other authorities.—HALE, *Chief Juſtice.* The will is entire, and we are not adviſed to grant a prohibition in ſuch caſe.

Styles Reg. 587. 10. Mod. 21. 63. 272. 386. 430. Gilb. Eq. Rep. 203. 226. Fitz. 110. 125. 303. 1. Peer. Wms. 388. 527. 549. 3. Peer. Wms. 102. 115. 166. 2. Stra. 777. 847. 865. 4. Com. Dig. "Prohibition" (G. 16.). 2. Term Rep. 473.

Caſe 58.

Wilkinſon *againſt* Rocklas.

The goods of an outlaw may be recovered by *information* in the nature of trover.

HALE. It is the courſe of THE EXCHEQUER in caſe of an *outlawry* to prefer an information, in the nature of trover and converſion, againſt him that hath the goods of the party outlawed.

—Hardres, 22. 10. Mod. 188. 357. 380. 409. 11. Mod. 173. 12. Mod. 175. 438. Fitzg. 265. Comyns, 51. 1. Peer. Wms. 445. 684. 690. 2. Peer. Wms. 269. 1. Ld. Ray. 305. Tidd's Practice, 67, 68.

Caſe 59.

* Parſons *againſt* Perns.

Hilary Term, 22. & 23. *Car.* 2. *Roll* 1051.

If one of two women who are joint-tenants in fee make a feoffment to a man, and livery within view, and marry the feoffee before he enters on the land, his entry after the marriage is a good execution of the livery; for being within view an irrevocable intereſt paſſed to the feoffee, and the ſubſequent entry ſhall relate back ſo as to make the feoffment perfect.

S. C. Pollexfen, 45. to 53. S.C. 1. Vent 186. S.C. 2. Lev. 34. S.C. 3. Salk. 165. S. C. 2. Keb. 872. 880. Moor, 85. 4. Co. 68. Co. Lit. 52. 351. 1. Vern. 330. 8. Mod. 68. Perk. 214. Sheph. Touch. 216, 217.

TRESPASS. Two women were jointenants in fee. One of them made a charter of feoffment, and delivered the deed to the feoffee, and ſaid to him, being within view of the land, "Go, "enter, and take poſſeſſion;" but before any actual entry by the feoffee, the feoffor and feoffee intermarry.

The queſtion was, Whether or no this marriage, coming between the delivery of the deed and the feoffee's entry, had deſtroyed the operation of the livery within the view?

POLLEXFEN. It hath not; for the power and authority that the feoffee hath to enter, is coupled with an intereſt, and not countermandable in fact, and if ſo, not in law. If I grant one of my horſes in my ſtable, nothing paſſeth till election, and yet the grant is not revocable: ſo till attornment nothing paſſeth, and yet the deed is not revocable. If the woman in our caſe had married a ſtranger, that would not have been a revocation: *Perk.* 29. I ſhall compare it to the caſe of *Burgaine v. Spurling*, *Cro. Car.* 273. 284 *(a)*. Now for the intereſt gotten by the huſband by the marriage; he hath no eſtate in his own right. If a man be ſeiſed in the right of his wife, and the wife be attainted of felony, the lord ſhall enter and ouſt the huſband; he gains nothing but a bare perception of profits till iſſue had: After iſſue had, he has an eſtate for life. Where a man that hath title to enter, comes into poſſeſſion, the law doth execute the eſtate to him: 7. *Hen.* 7. *pl.* 4. 2. *Roll. Abr. tit.* "*Attornment.*" 38. *Edw.* 3. *pl.* 11. *Brook tit.* "*Feoffment*," 57. *Moor*, 85. 3. *Cro.* 370.

HALE, *Chief Juſtice*, ſaid to the counſel on the other ſide, You will never get over the caſe of 38. *Edw.* 3. *pl.* 11. My LORD COKE to that caſe ſaith, that the marriage without attornment, is an execution of the grant: but that I do not believe; for the attendance of the tenant ſhall not be altered without his conſent. The effectual part of the feoffment is, "Go, enter, and take poſſeſſion."

(a) S. C. Jones, 369.

TWISDEN,

TWISDEN, *Juſtice.* Suppoſe there be two women ſeiſed, one of one acre, and another of another acre, and they make an exchange, and then one of them marries before entry, ſhall that deſeat the exchange?

PARSONS *againſt* PLANE.

HALE, *Chief Juſtice.* That is the ſame caſe.—So judgment was given accordingly, by THE WHOLE COURT, for the plaintiff.

* Zouch *againſt* Clare.

Caſe 60.

THOMAS tenant for life; the remainder to his firſt, ſecond, and third ſon; the remainder to *William* for life; and then to his firſt, ſecond, and third ſon; and the like remainders to *Paul*, *Francis*, and *Edward*, with remainders to the firſt, ſecond, and third ſon of every one of them. *William*, *Paul*, *Francis*, and *Edward*, levy a fine to *Thomas*; *Paul* having iſſue two ſons at the time. Then *Thomas* made a feoffment.

A preſent right of entry will ſupport a freehold contingent remainder.

1. Vent. 188. 2. Keb. 872. 881. 2. Lev. 35. Gilb. Eq. Rep. 34. 10. Mod. 362. 11. Mod. 121. 12. Mod. 174. Comyns, 62. 1. Ld. Ray. 314. 316. 2. Peer. Wms. 379. 610. 613. 3. Peer. Wms. 210.

MR. LEAK urged, that the remainders were hereby deſtroyed.

HALE, *Chief Juſtice.* Suppoſe *A.* be tenant for life, the remainder to *B.* for life, the remainder to *C.* for life, the remainder to a contingent, and *A.* and *B.* do join in a fine, doth not *C.*'s right of entry preſerve the contingent eſtates? If there had been in this caſe no ſon born, the contingent remainders had been deſtroyed; but there being a ſon born, it left in him a right of entry, which ſupports the remainders: and if we ſhould queſtion that, we ſhould queſtion all; for that is the very baſis of all conveyances at this day.—And judgment was given accordingly.

Caſes Temp. Talb. 238. The ſame point adjudged in the caſe of Parkhurſt *v.* Smith, Leſſee of Dormer, in the Houſe of Lords, on the 23d February, 1741, reported 4. Brown's Caſes Parl. 405, 3. Atk. 135. 2. Stra. 1105. 18. Viner's Abr. 413 Fearn. Cont. Rem. 212.; and ſee Mr. Hargrave's note (2), Co. Lit. 205. a.

EASTER TERM,

The Twenty-Fourth of Charles the Second,

IN

The King's Bench.

Wednesday, April 24, 1672.

Sir Matthew Hale, *Knt. Chief Juſtice.*
Sir Thomas Twiſden, *Knt.*
Sir William Moreton, *Knt.* } *Juſtices.*
Sir Richard Rainsford, *Knt.*
Sir Heneage Finch, *Knt. Attorney General.*
Sir Francis North, *Knt. Solicitor General.*

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*[93]

Caſe 1.

If, after judgment affirmed on error, the plaintiff become bankrupt, and the judgment aſſigned, and then the plaintiff levies execution, THE COURT will detain the money, that *the aſſignees* may recover it by proving their *title* in a *ſcire facias*.

Monke *againſt* Morris and Clayton.

AN ACTION was brought by *Monke* againſt the defendants, and judgment was given for him. The defendants brought a writ of error, and the judgment was affirmed.

JONES moved, that the money might be brought into court, the plaintiff having become a bankrupt.

WINNINGTON. This caſe was adjudged in the common pleas, *viz.* A man brought an action of debt upon a bond and had a verdict, and before the *day in bank* became a bankrupt: it was moved, that that debt was aſſigned over, and prayed to have the money brought into court; but the Court refuſed it.

COLEMAN. We have the very words for us in effect; for now it is all one as if judgment had been given for the aſſignees of the commiſſioners.

S. C. 3. Keb. 1. 14. 68. S. C. 1. Vent. 193. Poſt. 215. Cro. Car 166. 176. 1. Lev. 13. 3. Lev. 58. 70. 191. 2. Sid. 113. 2. Jones, 196. 1. Vent. 137. 360. 1. Vern. 94. Gilb. Eq. Rep. 35. 103. 140. 221. 10. Mod. 244. 432.

TWISDEN,

TWISDEN, *Juſtice*. How can we take notice that he is a bankrupt? Any execution may be ſtopped at that rate by alledging that there is a commiſſion of bankrupt out againſt the plaintiff: if he be a bankrupt, you muſt take out a ſpecial *ſcire facias* and try the matter, whether he be a bankrupt or not. Which JONES ſaid they would do; and THE COURT granted.

MONRE *againſt* MORRIS AND CLAYTON.

Anonymous. Caſe 2.

TWISDEN, *Juſtice*. If a *mariner* or *ſhip carpenter* run away, he loſes his wages due: which HALE, *Chief Juſtice*, granted.

S. C. 1. Vent. 146. 1 Ld. Ray. 398. 576. 632. 639. 650. 739. 1. Stra. 707. Comyns, 137. 2. Ld. Ray. 933. 1044. 1206. 1211. 1247. 1453. 8. Mod. 379. 10. Mod. 78. 264. 11. Mod. 5. 31. 43. 12. Mod. 246. 405. 440. 511. 526. Gilb. Eq. Rep. 226. Fitzg. 197.—See alſo 22. & 23. Car. 2. c. 11. ſ. 7. Dougl. 539. 1. Term Rep. 79.

* Henry Lord Peterborough *againſt* John Lord Mordaunt. Caſe 3.

A TRIAL AT BAR upon an iſſue out of the chancery, Whether *Henry* LORD *Peterborough* had only an eſtate for life or was ſeiſed in fee-tail? *Lord Peterborough*'s counſel alledged, that there was a ſettlement made by his father in the ninth year of *Charles* the Firſt whereby he had an eſtate in tail, which he never underſtood till within theſe three years: but he had claimed hitherto under a ſettlement made in the ſixteenth year of *Charles* the Firſt. To prove a ſettlement made in the ninth year of *Charles* the Firſt he produced a witneſs who ſaid, that he being to purchaſe an eſtate from my Lord the father, one *Mr. Nicholls*, who was then of counſel to my Lord, gave him a copy of ſuch a deed to ſhew what title my Lord had: but being aſked, Whether he did ſee the very deed, and compare it with that copy? he anſwered in the negative.—Whereupon THE COURT would not allow his teſtimony to be a ſufficient evidence of the deed; and ſo the verdict was for my *Lord Mordaunt*.

The copy of a deed cannot be given in evidence, unleſs proved to have been compared with the original, although delivered by *counſel* to a *purchaſor* as a *true* copy.

S. C. poſt. 114. S. C. 3. Keb. 1. 305. Ante, 4. 1. Lev. 25. 5. Mod. 221. 386. 6. Mod. 225. 248. 10. Mod. 42. 74. 108. 126. 292. 518. 1. Ld. Ray. 735. 3. Peer. Wms. 396. 2. Vern. 471. 591. 603. Prec. in Chan. 116. Gilbert's Law Evid. 4th edit. 96. 1. Atk. 49. 3. Atk. 214. Dougl. 594. Buller's N. P. 228. 254. 3. Term Rep. 151.

Cole *againſt* Forth. Caſe 4.

A TRIAL AT BAR directed out of chancery upon this iſſue, Whether "waſte or no waſte?" HALE, *Chief Juſtice*. By proteſtation I try this cauſe, remembering the ſtatute of 4. *Hen.* 4. c. 23.: and the ſtatute being read, whereby it is enacted, "That "after judgment given in the court of our lord the king, the "parties and their heirs ſhall be thereof in peace until the judg- "ment be undone by *writ of error* or *attaint*," he ſaid this cauſe had been tried in *London*, and, in a writ of error in parliament, the judgment affirmed: now they go into chancery, and we muſt try the cauſe over again, and the ſame point.

A court of *equity* may direct an iſſue, although a judgment has been given in the cauſe at *common law*.

Ante, 59. 3. Black. Com. 53. 1. Ch. Rep. App. 26. Moor, 818.

If a lessee pull down *a brew-house*, and build *dwelling houses* on its scite, it is *waste*.

A leaſe was made by *Hilliard* to *Green* in the year 1651; afterwards he deviſeth the reverſion to *Cole*; and *Forth* gets an under-leaſe from *Green* of the premiſes, being a brew-houſe: *Forth* pulls it down, and builds the ground into tenements.

S. C. 1. Lev. 309.

HALE, *Chief Juſtice*. The queſtion is, Whether this be waſte or no? And if it be waſte at *law*, it is ſo in *equity*. To pull down a houſe is waſte, * but if the tenant build it up again before an action brought, he may plead that ſpecially.

* [95]

S. C. 2. Saund. 252. 3. Keb. 8.

TWISDEN, *Juſtice*. I think the books are *pro* and *con*, whether the building of a new houſe be waſte or not.

Co. Lit. 53. a. 2. Roll. Abr. 815. 818. 4. Co. 63.

HALE, *Chief Juſtice*. If you pull down *a malt-mill*, and build *a corn-mill*, that is waſte.

Moor, 177. Hob. 234. Kellw. 39. Cro. Jac. 182. Owen, 93. 1. Salk. 368. 1. Term Rep. 56.

It is waſte to pull down and rebuild a houſe, although it be too bad to be repaired.

Then the counſel urged, that it could not be repaired without pulling it down.

TWISDEN, *Juſtice*. That ſhould have been pleaded ſpecially.

Co. Lit. 53. a. 1. Roll. Abr. 507. 2. Roll. 682. 815. 5 Co. 119.

HALE, *Chief Juſtice*. I hope the chancery will not repeal an act of parliament. Waſte in the houſe is waſte in the curtilage; and waſte in the hall, is waſte in the whole houſe.

So the Jury gave a verdict for the plaintiff, and gave him one hundred and twenty pounds damages.

2. Sid. 229. 2. Saund. 252. 1. Peer. Wms. 406. 527. 2. Peer. Wms. 140. 397. (606). 3. Peer. Wms. 467. Gilbert's Evidence, 4th edit. 270.

MICHAELMAS

MICHAELMAS TERM,

The Twenty-Fifth of Charles the Second,

IN

The King's Bench.

Thurſday, October 30, 1673.

Sir Matthew Hale, *Knt. Chief Juſtice.*
Sir Thomas Twiſden, *Knt.*
Sir Richard Rainsford, *Knt.* } *Juſtices.*
Sir William Wylde, *Knt.*
Sir Heneage Finch, *Knt. Attorney General.*
Sir Francis North, *Knt. Solicitor General.*

Caſe 1.

* Brightman *againſt* Parker.

Eaſter Term, 25. Car. 2. Roll 36.

In debt on bond in an inferior court, the defendant may, by *cuſtom*, pray a *writ of enquiry* after a *cognovit actionem.*

S. C. 3. Keb. 212. 2. Danv. 443. Cro. Eliz. 894. 2. And. 251.

AN ACTION OF DEBT was brought upon a bond in an inferior court; the defendant *cognovit actionem, et petit quòd inquiratur per patriam de debito.* This pleading came in queſtion in the king's bench upon *a writ of error*; but was maintained by the cuſtom of the place, where, &c.—HALE, *Chief Juſtice*, ſaid, It was a good cuſtom; for perhaps the defendant has paid all the debt but ten pounds, and this courſe prevents a ſuit in chancery. And it were well if it were eſtabliſhed by act of parliament as the common law.—WYLDE. That cuſtom is at *Briſtol.*—The judgment was affirmed.

Cro. Jac. 357. 1. Roll. Rep. 193. Styles, 134. Moor, 693. 1. Sid. 355. 2. Inſt. 204. 2. Burr. 779.

Randall

Caſe 2.

Randall *againſt* Jenkins.

24. *Car.* 2. *Roll* 311.

If a rent be granted out of *gavelkind lands* to a man and his heirs, it ſhall deſcend to all the ſons or brothers according to the deſcent of the land, and not go to the heir at common law; for the rent iſſues out, and is part of the profits of the land.

REPLEVIN. The defendant made conuſance as bailiff to *William Jenkins*, for a rent-charge granted out of gavelkind lands to a man and his heirs. The queſtion was, Whether this rent ſhould go to the heir at common law, or ſhould be partible amongſt all the ſons?

HARDRES. It ſhall go to the eldeſt ſon, as heir at law: for I conceive it is by reaſon of a cuſtom, time out of mind uſed, that lands in *Kent* are partible amongſt the males, as appears by *Lambard* in his *Perambulation of Kent* (*a*). Now, this being a thing newly created, it wants length of time to make it deſcendible by cuſtom. A feoffment in fee is made of gavelkind lands upon condition; the condition ſhall go to the heirs at common law, and not according to the deſcent of the land (*b*). If a warranty be annexed to ſuch lands, it ſhall deſcend only upon the eldeſt ſon (*c*). Now, this rent-charge, being a thing * contrary to common right, and *de novo* created, is not apportionable (*d*): It is not a part of the land; for if a man levy a fine of the land, it will not extinguiſh his rent, unleſs by agreement betwixt the parties (*e*): If there be a cuſtom in a particular place concerning dower, it will not extend to a rent-charge (*f*): There is no occaſion in this caſe to make the rent deſcendible to all; for the land remains partible amongſt the males, according to the cuſtom: and why a rent ſhould go ſo, to the prejudice of the heir, I know not. In the Year Book (*g*) it is ſaid, that *a rent* is a different and diſtinct thing from *the land*. Then the language of the law ſpeaks for general heirs, who ſhall not be diſinherited by conſtruction. The grand objection is, Whether the rent ſhall not follow the nature of the land? *Fitzherbert* ſaid, he knew four authorities that it ſhould (*b*). As for his firſt caſe, I ſay, that rent among parceners is of another nature than this; for that is diſtrainable of common right. As for the ſecond, I ſay, the rule of it holds only in caſes of proceedings and trials; which is not applicable to this cuſtom. His third caſe is, that if two coparceners make a feoffment, rendering rent, and one dies, the rent ſhall not ſurvive. To this I find no anſwer given. The text of *Littleton* (*i*) is further objected, where it is ſaid, that if land be deviſable by cuſtom, a rent out of ſuch lands may be deviſed by the ſame cuſtom; but authorities claſh in this point (*k*). He cited farther theſe books, *Lambard's Perambulation of Kent*; the *Year Book*, 14. *Hen.* 8. *pl.* 7, 8. 21. *Hen.* 6. *pl.* 11.; and the caſe of *Randall v. Roberts*, *Noy* 51.

* [97]

S. C. 3. Keb. 165. 214. S. C. 2. Lev 87. S. C. 1. Freem. 105. 345. S. C. 2. Danv. 547. S. C. 1. Vern. 489. S. P. poſt. 102. 112. S. P. Salk. 244. 2. Ro. Abr. 780. Noy, 15. Cro. Car. 411. Cro. Jac. 408. Co. Lit. 148. Hardres, 325. 1. Sid. 135. 2. Lev. 80. Raym. 59. 76. 3. Mod. 208. 10. Mod. 417. 11. Mod. 160. 2. Ld. Ray. 1024. 1292. 1. Peer. Wms. 64. 475. 3. Peer. Wms. 63. 2. Bac. Abr. 640. See Robinſ. on Gavelkind, 84. 1. Term Rep. 466. 474.

(*a*) Page 543.
(*b*) 9. Hen. 7. pl. 24.
(*c*) 38. Edw. 3. pl. 22. 43. Edw. 3. pl. 19. Co. Lit. 376. Cro. Jac. 218. 8. Co. 8.
(*d*) Co. Lit. 143. 150.
(*e*) Brook. Abr. ſe. 201. b. pl. 58.
(*f*) Co. Lit. 12.
(*g*) 14. Hen. 8. pl. 4. 27. Hen. 8. pl. 4.
(*h*) Fitz. Abr. "Avowry," 150.
(*i*) Co. Lit. 322. a.
(*k*) Co. Lit. 111. a. Styles, 49.

DEN.

DEN. *contra.* I conceive this rent ſhall deſcend to all the brothers; for it is of the quality of the land, and part of the land; it is contained in the bowels of the land, and is of the ſame nature with it; as it is ſaid by THORPE, *Juſtice*, in *Zouche's Caſe*, 22. *Aſſ.* 78. which I take to be a direct authority, as well as an inſtance. In ſome boroughs a man might have deviſed his land by cuſtom, and in thoſe places he might have deviſed a rent out of it: *Co. Litt.* 111. a. The ſtatute *de bonis conditionalibus* brought in a new eſtate of inheritance by way of intail. Now this eſtate tail in gavelkind lands hath been taken to deſcend to all the brothers; and the reaſon is, becauſe it is part of the fee-ſimple, though created *de novo:* ſo uſes follow the nature of the land. The caſes that have been cited, were *not the opinion of the Court, but of them that argued. *Mr. Lambard* 47. ſaith, That the cuſtom extends to advowſons, commons, rent-charges, as well as to land. It is objected, that here muſt be a preſcription: I anſwer, gavelkind law is the law of *Kent*, and is never pleaded, but preſumed. 7. *Edw.* 3. *pl.* 38. *Co. Litt.* 175. 2. *Edw.* 4. *pl.* 18. and *Co. Litt.* 140. ſaith, The cuſtoms of *Kent* are of common right; and if ſo, then our rent-charge will go of common right to all the brothers.

RANDALL *againſt* JENKINS.

*[98]

Poſt. 112. pl. 7.

HALE, *Chief Juſtice*, RAINSFORD and WYLDE, *Juſtices*, were of opinion, That the rent ought to deſcend to all the brothers, according to the deſcent of the land; becauſe the rent is part of the profits of the land, and iſſues out of the land.—And they gave judgment accordingly.

Pybus *againſt* Mitford.

Caſe 3.

A MAN covenanted to ſtand ſeiſed to the uſe of the heirs of his body.

If *A.* covenant to ſtand ſeiſed to *the uſe of the heirs of his body*, he ſhall be adjudged to take an eſtate for *his own life* by *implication.*

HALE, *Chief Juſtice.* The *heir* and the *anceſtor* are cor-relatives, and as one thing in the eye of the law; and that is the reaſon why a man ſhall not make his right heir a *purchaſor*, without putting the whole fee-ſimple out of himſelf. If the father's eſtate turn to an eſtate for life, there will be no queſtion. In the caſe of *Fenwick v. Mitford* (*a*), there did reſult an eſtate for life, to knit the limitation to the original eſtate. Here, FIRST, We are in the caſe of an eſtate tail; and the Judges uſe to go far in making ſuch a limitation good: then, SECONDLY, We are in the caſe of *an uſe*, which is conſtrued as favourably as may be, to comply with the intention of the party. This caſe is not as if he ſhould have covenanted to ſtand ſeiſed to "the uſe of the heirs of the "body of *J. D.*" There the covenantor would have had a fee-ſimple in the mean time: but the caſe is all one as if the limitation had been "to himſelf, and the heirs of his own body." See the *Earl of Bedford's Caſe* (*b*).

S. C. poſt. 121. 159. S. C. 3. Keb. 239. 316. 338. S. C. 2. Lev. 75. S. C. Ray. 228. S.C 1. Vent. 372. S. C. 1. Freem. 351, 369. Poſt. 226. 237. Co. Lit. 22. 1. Co. 13. 2. Salk. 679. 2. Eq. Ab 753. Fearne's Cont. Rem. 49. Gilb. Dev. 99. Moor. 718.

TWISDEN, *Juſtice.* We muſt make it good if we can.—*Cur. adviſare vult.*

Cowp. 234.—(*a*) Moor, 284. (*b*) Jenk. 248. 7. Co. 7. 2. Anderſon 197.

Auſtin

Caſe 4.

* Auſtin *againſt* Lippencott.

Trinity Term, 25. Car. 2. Roll 850.

A father is tenant for life, with remainder to his ſon in fee, and by the deed of ſettlement an annuity is given to the ſon during the life of the father; the ſon releaſes "all arrears of "rent, annuities, "*titles*, and de- "mands," to the day of the releaſe. *Quære*, Whether this paſſes the *inheritance* as well as the *annuity?*

S. C. 3. Keb. 243. 3. Co. 154. b. Cro. Jac. 486. Co. Lit. 291. b. 10. Mod. 423. 12. Mod. 401. 455. 460. Gilb. Eq. Rep. 106. 143. 1. Vern. 32. Prec. Ch. 545. 1. Peer. Wms. 329. 639. 728. 2. Peer. Wms. 316. 321. 1. Ld. Ray. 235. 518. 522. 664. 2. Ld. Ray. 786. 1306.

A SPECIAL VERDICT. *Francis* the father was tenant for life, the remainder in fee to *Francis* the ſon; and by the deed by which this eſtate was thus ſettled, one hundred pounds a-year was appointed to be paid to *Francis* the ſon during the father's life. The ſon releaſeth to the father "all arrears of "rent, annuities, titles, and demands by virtue of that indenture;" and the queſtion was, Whether this releaſe paſſed *the inheritance* as well as *the annuity?*

POLLEXFEN. I conceive this releaſe ſhall not paſs any eſtate in the land; and my reaſon is, Becauſe there is no mention of the land nor of any eſtate therein. The principal thing intended and expreſſed is the annuity; then the releaſe concludes to the day of the releaſe, which doth manifeſt that he did not intend to releaſe any thing that was not to come to him till after the death of his father. It is true, here is the word "*demand*," but that will not do it; as in *Seaman v. Oakley*, *Cro. Eliz.* 268. Then for the word "*titles*;" in *Nichol's Caſe*, *Plowd.* 494. and in *Altham's Caſe*, 8. *Co.* 153. *b.* it is where a man hath lawful cauſe to have that which another doth poſſeſs; ſometimes it is taken in a larger ſenſe, and then it doth include right. Upon conſtruction of this releaſe I think it ought to be taken in the ſtricter ſenſe, and the intention of the party muſt guide the conſtruction; for where there are general words in the beginning and particular words afterwards, the particular do reſtrain the general: and ſo *vice verſâ* for enlargement. He cited *Hen v. Hanſon* (*a*) in this court, where a releaſe of *all demands* would not releaſe *a rent-charge*, by the opinion of three Judges againſt TWISDEN for that reaſon, and becauſe words in deeds are to be taken according to common acceptation: he cited 2. *Roll.* 409. In our caſe, the general words of "all ſuits and titles" are limited and reſtrained to the annuity and title of that, and ſhall not by a large conſtruction be extended to anything elſe.

HALE, *Chief Juſtice*. How hath the inheritance gone?

POLLEXFEN. The grandchild has that.

HALE, *Chief Juſtice*. I think a releaſe of "*all demands*" will not extinguiſh *a rent*; but if it were "*all demands out of land*," it were another thing. It hath been held over and over again, that it does not extinguiſh and diſcharge a covenant not broken: but what ſay you to this releaſe of "all titles?" For * [100] it appears * in expreſs terms, that the ſon did not only releaſe the arrears of the annuity, but the thing itſelf; and not only ſo, but all other titles by virtue of that deed. Suppoſe the caſe had been but thus: The father is tenant for life, the remainder to the ſon

(*a*) 1. Keb. 499. 510. 1. Sid. 141. 1. Lev. 99.

for

for life; the ſon releaſeth to his father all *the title* that he has by virtue of that deed: had not this paſſed the ſon's eſtate for life? In the caſes that you have cited it is allowed, that a releaſe of "all "titles" will paſs a right to land: he had a title to the annuity, and a title to the remainder; now he releaſeth the annuity and all other titles which he hath by that deed or otherwiſe howſoever.— To hear MAYNARD, *Serjeant*, on the other ſide (*a*).

AUSTEN *againſt* LIPPENCOTT.

(*a*) It does not appear that this caſe was determined. S. C. 3. Keb. 244.

Wilſon *againſt* Robinſon. Caſe 5.

Trinity Term, 24. *Car.* 2. *Roll* 1415.

A MAN deviſeth all his tenant-right eſtate at *Brickend*, and "all that my father and I took of *Rowland Hobbs*."

A deviſe of "*all my* tenant-right *eſtate* at "*A.*" paſſes a *fee ſimple*.

S. C. 3. Keb. 180. 245. S.C. 2. Lev. 91. 1. Roll. Abr. 834. Cro. Jac. 290. 3. Mod. 45. 8. Mod. 90. 102. 10. Mod. 94. 287. 525. 532. 12. Mod. 592. Fitzg. 18. 70. 116. 151. 288. 314. Gilb. Eq. Rep. 30. 77. 2. Vern. 461. 560. 564. 625. 691. Prec. Chan. 37. Abr. Eq. 178. Caſes Temp. Talb. 110. 157. 284. Comyns, 337. 1. Ld. Raym. 187. 2. Ld. Raym. 831. 1325. 299. 306. 660. 360. 4. Term Rep. 93.

LEVINZ. I conceive that theſe words paſs only an eſtate for life; for it is not mentioned what eſtate he hath. In the caſe of *Wilkinſon v. Merryland* (*a*), a deviſe was made of all the reſt of his goods, chattels, leaſes, eſtates, mortgages, debts, ready money, &c. and the Court held, that no fee paſſed; and ſaid it was a doubt, whether any eſtate would paſs in that caſe, but what was for years, being coupled only with perſonal things. In the caſe of *Jerman v. Johnſon* (*b*), one deviſed all his eſtate, paying his debts and legacies; now his perſonal eſtate came but to twenty pounds, and his debts were one hundred pounds; there, indeed, all his real eſtate paſſed becauſe of the payment of his debts. And in our caſe the following particulars are but a deſcription of the land, and contain no limitation of the eſtate. If a man deviſeth *Black-acre* to one and the heirs of his body, AND ALSO deviſeth *White-acre* to the ſame perſon, he hath but an eſtate for life in *White-acre*, though he hath a fee-ſimple in the other: for the word "alſo" is not ſo ſtrong as if it had been "in the ſame manner." *Moor* 152. *Yel.* 209.

WESTON, *contra*. I conceive an eſtate of inheritance (*c*) doth paſs; for the word "eſtate" comprehendeth all his intereſt. When a man deviſeth "all his eſtate," he leaves nothing *in himſelf. In the caſe of *Jerman v. Johnſon* it was held, that "all "my eſtate" comprehends "all my title and intereſt" in the land. If a man deviſe "all his inheritance," this carries the fee-ſimple of his land: and the word "all his eſtate" is as comprehenſive as that.

* [101]

HALE, *Chief Juſtice*, and WYLDE, *Juſtice*. By a grant or releaſe of "*totum ſtatum ſuum*," the fee-ſimple will paſs. If the

2. Peer. Wms. 523. 3. Peer. Wms. 56. 61. 91. 295. Gilb. Dev. 24. Cowp. Dougl. 434. 739. 763. 1. Term Rep. 411. 2. Term Rep. 656. 3. Term Rep.

(*a*) Cro. Car. 447. 449. 1. Roll. Abr. 834. pl. 14.

(*b*) Trinity Term, 1649. Roll 153. Styles, 211. 293.

(*c*) Cro. Jac. 290.

words

WILSON *againſt* ROBINSON.

words had been "all my tenant-right lands," it had been otherwiſe: but the word "eſtate" is more than ſo. If a man deviſeth all his copyhold eſtate, will not all his whole intereſt paſs?—*Adjournatur (a).*

(a) The Court held, that *the fee* of the tenant-right land paſſed by this deviſe. S. C. 3. Keb. 180. 245. S. C. 1. Lev. 91. but as the ſpecial verdicts had not found how many acres of the tenant-right lands, and how many of the other lands, a *venire facias de novo* was awarded. S. C. 1. Lev. 91.

Caſe 6.

Norman *againſt* Foſter.*

Trinity Term, 25. Car. 2. Roll 436.

On a covenant for quiet enjoyment, a breach that a ſtranger entered *claiming title*, without ſhewing the *kind of title* under which he claimed, is bad.

S. C. 3. Keb. 246.
Ante, 66.
Poſt. 290.
2. Danv. 50.
3. Leon. 43.
Cro. Jac. 315. 319. 425. 444.
4. Co. 80.
1. Roll. Abr. 430.
Vaugh. 118.
1. Lev 301.

AN ACTION OF DEBT upon a bond to perform covenants in an indenture of leaſe; one covenant is for quiet enjoyment: and the plaintiff aſſigns for breach, That a ſtranger entered *claiming title*, but does not ſay what title he had.

HALE, *Chief Juſtice*. *Habens titulum* at that time, would have done your buſineſs. My *Lord Dyer's Caſe* (*a*) is, That another entered claiming an intereſt; but that is not enough; for he may claim under the leſſee himſelf. He mentioned the caſes in *Moor* 861. and *Hob.* 34. of *Tiſdale v. Eſſex*. If the covenant had been to ſave him harmleſs againſt all lawful and unlawful titles, yet it muſt appear, that he that entered did not claim under the leſſee himſelf.—HALE. If I covenant that I have a lawful right to grant, and that you ſhall enjoy notwithſtanding any claiming under me; theſe are two ſeveral covenants, and the firſt is general, and not qualified by the ſecond.—And ſo ſaid WYLDE; and that one covenant went to *the title*, and the other to *the poſſeſſion*; an *aſſumpſit* to enjoy *ſine interruptione alicujus*, that is, whether by *title* or by *tort*, a quiet poſſeſſion being to be intended to be the chief cauſe of the contract (*b*).

2. Lev. 37. 194. 3. Lev. 325. 1. Saund. 60. 2. Saund. 177. 181. 2. Mod. 213. 3. Mod. 135. 8. Mod. 318. 10. Mod. 143. 384. 158. Comyns, 230. 2. Show. 425. 1. Stra. 400. Dougl. 43. 1. Term Rep. 671. 3. Term Rep. 584.

(*a*) Dyer, 328.

(*b*) It is ſaid, that the Court inclined ſtrongly for the defendant, but that the matter was adjourned. S. C. 3. Keb. 246.

* [102]

Caſe 7.

* Angell's Caſe.

A pardon of "*all offences*" includes every crime not capital.

ANGELL convicted of *barratry*, produced a pardon, which was of all "treaſons, murders, felonies; and all penalties, forfeitures, and offences."—THE COURT ſaid, the words "all offences" will pardon all offences that are not capital.

2. Show. 334. 2. Mod. 53. 1. Lev. 8. 26. 120. Fitzg. 107. 306. 8. Mod. 104. 11. Mod. 233. 12. Mod. 119. 1. Ld. Raym. 215. 637. 2. Ld. Ray. 818. 1. Stra. 473. 529. 2. Stra. 912. 1272. 1. Peer. Wms. 696.

Blackburn

Blackburn *againſt* Graves.

Caſe 8.

TROVER for one hundred loads of wood. On a ſpecial verdict the caſe was, A copyholder ſurrenders to the uſe of ſeveral perſons for years *ſucceſſivè*, the remainder in fee to *J. S.*

In copyholds, the admittance of a *particular tenant* is an admittance of all the *remainder-men* for every purpoſe except the lord's fine.

WYLDE, *Juſtice*. An admittance of a particular tenant is an admittance of all the remainders to all purpoſes but only the lord's fine: and if the cuſtom be, that the fine paid by the firſt tenant ſhall go to all the remainders, then the admittance of the firſt man is to all intents and purpoſes an admittance of all that come after. In this caſe the poſſeſſion of the leſſee for years, is the poſſeſſion of the remainder-man. In the caſe of *Baker v. Dereham* (*a*), there was a ſurrender to the uſe of a man and his heirs of copyhold land that deſcended according to the cuſtom of *Borough-Engliſh*: the ſurrenderee died before admittance; and the opinion of the Court was, that the right would deſcend to the youngeſt according to the cuſtom.

S. C. poſt. 120. S. C. 3. Keb. 263. 329. S. C. 1. Vent. 260. S. C. 2. Lev. 107. S. C. 2. Danv. 185. Ante, 96.

4. Co. 21. 3. Leon. 70. 4. Leon. 38. 1. And. 192. 1. Roll. Abr. 505. 1. Vent. 261. 1. Sid. 61. 8. Mod. 73. 107. Fitzg. 287. 1. Peer. Wms. 63. 66. 3. Peer. Wms. 63. 1. Ld. Ray. 1024. 2. Vern. 226. 1. Stra. 445. 4. Bac. Abr. 331. 1. Burr. 212. Gilb. Tenures, 162. 194. 2. Term Rep. 484.

(*a*) Coke's Copyholder, 70.

Blackborough and his Wife *againſt* Graves and Others.

Caſe 9.

Hilary Term, 24. & 25. Car. 2. Roll 1216.

UPON a Caſe moved, HALE, *Chief Juſtice*, ſaid, That if a tenant in common bring a *perſonal action* without his fellow joining in the ſuit, the defendant ought to take advantage of it in *abatement*; but if he plead *not guilty*, it ſhall be good; but then the plaintiff ſhall recover damages only for *a moiety*. So if a tenant in common ſeal a leaſe of ejectment, he ſhall recover but a moiety.

If one tenant in common ſue alone, he ſhall only recover his moiety, and the defendant may plead *co-tenancy* in *abatement*.

S. C. 3. Keb. 263. 329. S. C. Carth. . Co. Lit. 198. 202. 1. Show. 101. 12. Mod. 96. 301. 312. 341. 1. Ld. Raym. 312. 341. 2. Strange, 820. S. P. Heaſeman v. Moore in B. R. Mich. Term, 15. Geo. 2.

Anonymous.

Caſe 10.

A JUSTICE OF THE PEACE committed a brewer for not paying the duty of exciſe: The brewer was brought into court by *habeas corpus*.—SYMPSON. It ought to appear that he * was a common brewer.—HALE, *Chief Juſtice*. The ſtatute 12. *Car.* 2. c. 23. ſ. 36. doth prohibit the bringing of *a certiorari*, but not *a habeas corpus*. And want of averment of the matter of fact, may be amended in a return in court; and if it be not true, at their peril be it.—So it was mended.

Defect in form, or averment in * [103] fact, in the return to *habeas corpus* may be amended before the return is filed.

1. Vent. 29. 2. Lev. 128. 3. Keb. 434. Cro. Car. 133. 3. Mod. 164. 1. Salk. 350. 1. Ld. Raym. 580. 603. 1. Stra. 391. Cowp. 407. 523. Dougl. 158.

Anonymous.

Case 11. Anonymous.

Foreign attachment.

MONEY owing upon a judgment given in the king's court cannot be attached.

See Cro. Car. 63. 1. Rol. 552.

Memorandum.

The promotion of *Jones*, *North*, and *Finch*, and the removal of *Ashley*.

ON *November* 17th, in this Term, SIR WILLIAM JONES, *Knt.* was made *Solicitor General* in the room of SIR FRANCIS NORTH, *Knt.* who was promoted to the office of *Attorney General*, in the place of SIR HENEAGE FINCH, *Knt.* who was made *Lord Keeper of the Great Seal*, in the room of LORD ASHLEY, who was, on *Monday*, 10. *November*, 1673, removed from the office of Lord High Chancellor of England.

HILARY TERM,

The Twenty-Fifth and Twenty-Sixth of Charles the Second,

IN

The King's Bench.

Friday, 23. *January*, 1673.

Sir Matthew Hale, *Knt. Chief Juſtice.*

Sir Thomas Twiſden, *Knt.*
Sir Richard Rainsford, *Knt.*
Sir William Wylde, *Knt.* } *Juſtices.*

Sir Francis North, *Knt. Attorney General.*
Sir William Jones, *Knt. Solicitor General.*

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* Baker *againſt* Bulſtrode. Caſe 12.

DEBT UPON A BOND conditioned to perform an award. The condition was, That the defendant ſhould ſeal and execute a releaſe to the plaintiff. The defendant demurs; Becauſe the plaintiff did not alledge in his declaration, a tender of a releaſe. It was urged, that the condition was not "to make," but only "to ſeal and execute, &c."—But PER CURIAM, He is bound to do it without a tender. And the word "execute," or the word "ſeal," comprehends the making. And *Lamb's Caſe*, 5. *Co.* 23. was cited.

On a condition to execute a deed to the ſatisfaction of the plaintiff's counſel, the defendant, to ſave the condition, muſt tender the deed.

S. C. 3. Keb. 273. S. C. Ray. 232. S. C. 1. Vent. 255. S. C. 2. Lev. 95. S. C. 2. Danv. 39. Ante, 67. 1. Roll. Abr. 465. 3. Mod. 191. Cro. Jac. 661. 5. Co. 23. 10. Mod. 153. 189. 222. 420. 423. 2. Ld. Ray. 1095. 1. H. Bl. Rep. 274.

Caſe 13.

Warren *againſt* Prideaux.

Trinity Term, 24. *Car.* 2. *Roll* 1472.

A preſcription to have a buſhel of ſalt of *every ſhip* that comes laden with ſalt within a certain *port*, in conſideration of maintaining *the quay*, and keeping *a buſhel* to meaſure the ſalt, is not good.

S. C. 3. Keb. 249. 275. S. C. Ray. 232.

* 105]

S. C. 2. Lev. 96. S. C. 1. Freem. 355. Ante, 48. Poſt. 231. 3. Lev. 400. 425. Ray. 52. 1. Ld. Ray. 385. 2. Stra. 1228. 3. Burr. 1402. 1406. Cowp. 47. 1. Term Rep. 660.

A DISTRESS AND AVOWRY FOR TOLL. The preſcription was for toll in conſideration of maintaining the key, and keeping a buſhel to meaſure ſalt, *viz.* That in conſideration thereof, he, and thoſe, &c. have had, time out of mind, &c. a buſhel of ſalt of every ſhip that comes laden with ſalt into *Slipper-point*.

POLLEXFEN for the avowant alledged, that the maintaining of the key is for public good: *Co. Magn. Charta*, 222. *Roll.* 265. It is true, it is not alledged, that they did actually uſe the weights and meaſures. 1. *Leon.* 231. But it being alledged, that the ſhip came within *Slipper-point*, it is enough to charge the plaintiff with the payment.—As for the diſtreſs taken, which is part of the ſhip's lading, *viz.* ſalt, it is objected, that it cannot be diſtrained, becauſe it is part * of the thing from which the duty ariſeth: But I anſwer, That this is not like to a diſtreſs upon land, nor to be judged of according to the rules allowed in caſes of ſuch diſtreſſes. There were cited on this ſide 21. *Hen.* 7. *pl.* 1. *Cro. Eliz.* 710. *Smith v. Shepheard*, *Dyer* 352.

COURTNEY, *contra*. I conceive this preſcription ought to have ſome conſideration, and to be grounded on a meritorious cauſe, to bind a ſubject. The keeping of the buſhel is no meritorious cauſe, becauſe it is preſumed that the party hath the uſe of it himſelf.

HALE, *Chief Juſtice*. The preſcription is not for *a port* but *a wharf*. If any man will preſcribe for a toll upon the ſea, he muſt alledge a good conſideration; becauſe by MAGNA CHARTA, and other ſtatutes, every one hath a liberty to go and come upon the ſea without impediment.

WYLDE, *Juſtice*. This cuſtom or preſcription is laid, to have a buſhel of ſalt of every ſhip that comes within the *Slipper-point:* If a ſhip be driven in by ſtreſs of weather, and goes out again the firſt opportunity that preſents, ſhall that ſhip pay?

HALE, *Chief Juſtice*. If he had ſaid, that he had a port, and was bound to maintain that port, and that he, and all thoſe whoſe eſtate he had, &c. that might have been a good preſcription: But in this caſe, there muſt be a ſpecial inducement and compenſation to the ſubject by reaſon of thoſe ſtatutes, by which all merchants, and others, have liberty to come in and go out.

THE COURT inclined that the preſcription was not good; and judgment was given for the plaintiff.

Lord

Lord Fitzwalter's Caſe.

Caſe 14.

A TRIAL AT BAR concerning the river of *Wall-fleet*: The queſtion was, Whether the defendant had not the right of fiſhing there, excluſive of all others?

A perſon claiming a free fiſhery, a ſeveral fiſhery, or a common of fiſhery, muſt ſhew the foundation of his claim; for the right is *primâ facie* in all the king's ſubjects, or in the owner of the ſoil.

HALE, *Chief Juſtice.* In caſe of a private river, the lord's having the ſoil is good evidence to prove, that he hath the right of fiſhing; and it puts the proof upon them that claim *liberam piſcariam.* But in caſe of a river that flows and reflows, and is an arm of the ſea, there, *primâ facie*, it is common to all: and if any will appropriate a privilege to himſelf, the proof lieth on his ſide; for in caſe of an action of treſpaſs brought for fiſhing there, it is, *primâ facie*, a good juſtification to ſay, that the *locus in quo* is *brachium maris, in quo unuſquiſque ſubjectus dom. regis* * *habet et habere debet liberam piſcariam.* In the river *Severn* there are particular reſtraints, as *gurgites*, &c. but the ſoil doth belong to the lords on either ſide: and a ſpecial ſort of fiſhing belongs to them likewiſe; but the common ſort of fiſhing is common to all. The ſoil of the river of *Thames* is in the king; and the lord mayor is conſervator of the river, and it is common to all fiſhermen: and therefore there is no ſuch contradiction betwixt the ſoil being in one, and yet the river being common for all fiſhers, &c.

* [106]

S. C. 3. Keb. 242. 459. 555. S.C.2.Lev. 139. S.C.1.Free.414. 6. Mod. 73. 2. Salk. 537. 637. 1. Salk. 357. 3. P.Wms. 257. Davis'sRep. 55. 16. Viner, 354.

See the caſe of the royal fiſhery of the river *Bann* in Ireland, Dav. Rep. 149. Salk. 137. Carter *v.* Murcot, 4. Burr. 2162. 2165. Seyman *v.* Courtneſs, 5. Burr. 2814. 2. Black. Com. 139. The Mayor of Lynn *v.* Turner, Cowp. 16. Dougl. 56. 443. 517. 3. Term Rep. 253. The Mayor of Orford *v.* Richardſon, 4. Term Rep. 437.

Sedgewick *againſt* Goſton.

Caſe 15.

Trinity Term, 24. Car. 2. Roll 347.

HALE, *Chief Juſtice*, ſaid, That a writ of error in parliament may be returned *ad prox. parliament.* ſuch a day; but if a particular day be not mentioned, then it is naught: and although there be a particular day expreſſed, yet if that day be at two or three Terms diſtance, the Court will adjudge it to be for delay; and it ſhall be no *ſuperſedeas.* And he ſaid he had looked into the Books upon the point. In THE REGISTER, he ſaid, there is a *ſcire facias ad prox. parliament.* but not a writ of error.

A writ of error returnable on a day certain in the next parliament is good.

S. C. Skin. 161. S. C. 3. Keb. 256. S. C. 2. Lev. 93. 405.

Ante, 28. Poſt. 112. 285. Cro. Jac. 341. Raſtal's Ent. 320. 1. Ld. Ray. 16.

EASTER TERM,

The Twenty-Sixth of Charles the Second,

IN

The King's Bench.

Wednesday, May 6, 1674.

Sir Matthew Hale, *Knt. Chief Juſtice.*

Sir Thomas Twiſden, *Knt.*
Sir Richard Rainsford, *Knt.*
Sir William Wylde, *Knt.*
} *Juſtices.*

Sir Francis North, *Knt. Attorney General.*
Sir William Jones, *Knt. Solicitor General.*

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*[107]

Caſe 1.

* Anonymous.

An executor may be a witneſs concerning the eſtate of his teſtator, if he is not the reſiduary legatee.

A TRIAL AT BAR.—HALE, *Chief Juſtice.* An executor may be a witneſs in a cauſe concerning the eſtate if he have not the ſurpluſage given him by the will. And ſo I have known it adjudged (*a*).

— Plowd. 541. Co. Lit. 212. Ld. Ray. 730. 3. Wilſ. 95. Gilb. Evid. 120. 1. Bl. Rep. 365. 4. Burr. 2254. 1. Peer. Wms. 287. 290. Dougl. 139. 141. note (51.). 3. Term Rep. 27. 35.

(*a*) See the 25. Geo. 2. c. 6. ſ. 3.

*Caſe 1.

Fountain *againſt* Coke.

The *term* is not extinguiſhed by the leſſees being tenant to the *præcipe*.

IF a leſſee for years be made tenant to the *præcipe* for ſuffering a common recovery, that doth not extinguiſh his term, becauſe it was in him for another purpoſe.—To which THE WHOLE COURT agreed.

S. C. 3. Bac. Abr. 453. S. C. 1. Vent. 195. 280. 7. Co. 38. Cro. Jac. 643. 2. Roll. Rep. 245. 8. Mod. 60. 10. Mod. 151. 12. Mod. 340. 385. 512. 1. Peer. Wms. 289. 3. Peer. Wms. 281. 288. 1. Vern. 20. 2. Vern. 700. Abr. Eq. 223. Comyns, 90. 1. Stra. 34. 101. 2. Stra. 1253. 2. Ld. Ray. 1166. Skin. 223. 3. Bac. Abr. 453. 1. Burr. 79. Cowp. 704. Cruiſe on Recov. 48. 1. Term Rep. 741.

See the 27. Hen. 8. c. 10. ſ. 3.

Jacob

Jacob Aboab's Caſe.

Caſe 2.

DEBT UPON A BOND was brought againſt him by the name of *Jacob*; and he pleaded, that he was called and known by the name of *Jaacob*, and not *Jacob*.—But it was over-ruled.

The name of *Jacob* inſtead of *Jaacob* an immaterial miſnomer.—S. C. 3. Keb. 278. 284. 2. Roll. Abr. 137. Co. Lit. 3. Cro. Eliz. 50. 176. Cro. Jac. 175. 1. Saund. 135.

Sir John Thorowgood's Caſe.

Caſe 3.

OFFLEY moved to quaſh an indictment of nuſance for ſtopping a water-courſe in *Kenſington*, becauſe it ran "*in detrimentum omnium inhabitantium*," *&c.*—WYLDE, *Juſtice*. I have known it ruled naught for that cauſe.—So quaſhed.

Indictment for nuſance, "to "the detriment "of the inhabitants," is bad.—S. C. 3. Keb. 284. 2. Roll. 83. pl. 11. Cro. Eliz. 90. 414. Cro. Jac. 382. 2. Leon. 283. 9. Co. 113. 1. Vent. 208. 1. Saund. 135. 6. Mod. 453. 2. Wilſ. 57. 1. Burr. 259.

* Benſon *againſt* Hodſon.

Caſe 4.

Hilary Term, 25. & 26. Car. 2. Roll 696.

A WRIT OF ERROR of a judgment in the county palatine of *Lancaſter* in replevin: the defendant makes conuſance as bailiff to *Anne Moſely*.

A. covenants to levy a fine to the uſe of himſelf and the heirs male of his body; remainder in tail to ſeveral others; remainder to his own right heirs; PROVIDED, that if there be a failure of iſſue male of his body, and *B.* his daughter be married OR of age, then ſhe ſhall have 200l. a-year for ten years. *A.* dies leaving iſſue male, who enters, makes a leaſe for one thouſand years, levies a fine and ſuffers a recovery, and dies without iſſue; his ſiſter *B.* being married AND of age.—The annuity to *B.* is barred by this *recovery*; for the remainder is barred out of which it iſſued, and it cannot be charged on *the leaſe*; for that was derived out of an eſtate tail preceding the commencement of the rent.—S. C. Ray. 236. S. C. 2. Lev. 28. S. C. 3. Keb. 274. 287. 292. S. C. 1. Freem. 362. S. C. 4. Bac. Abr. 330. 1. Sid. 102. Cro. Eliz. 769. Gilb. Eq. Rep. 16. 9. Mod. 178. 11. Mod. 181. 196. 210. 214. 12. Mod. 32. 513. Prec. Chan. 435. 1. Peer. Wms. 104. 509. 520. 536. 3. Peer. Wms. 171. 230. 235. Salk. 570. 1. Bl. Rep. 227. 611. Ambler, 382. Pigot on Recov. 21. 138. Cruiſe on Recov. 232. 2. Bac. Abr. 549. 552. Sanders on Uſes and Truſts, 193.

The lands were the lands of *Rowland Moſely*, and he covenanted to levy a fine of them to the uſe of himſelf, and the heirs males of his body, the remainder in tail to ſeveral others, the remainder to his own right heirs; PROVIDED, That if there ſhall be a failure of iſſue male of his body, and *Dame Elizabeth* be dead, and *Anne Moſely* be married *or* of the age of twenty-one years, then ſhe ſhall have two hundred pounds *per annum* for ten years: then *Rowland Moſeley* dies leaving iſſue *Sir Edward Moſely*: *Sir Edward* makes a leaſe for one thouſand years, then levies a fine and ſuffers a recovery, then dies without iſſue male: and the contingents did all happen.

The queſtion is, Whether this rent-charge of two hundred pounds a-year be barred by the fine and recovery, and ſhall not operate upon the leaſe?

LEVINZ. I conceive the fine is not well pleaded; for nothing is ſaid of the *king's ſilver*, and if that be not paid it is void (*a*): then

(*a*) This exception was over-ruled. S. C. 2. Lev. 31.

BENSON *againſt* HOBSON.

they have pleaded a common recovery, but not the execution of it by entry (*a*). Now I conceive the common recovery doth deſtroy *the eſtate-tail* but not *the rent*. The reaſon why a common recovery is a bar, is becauſe of the intended recompence. Now that is a fictitious thing, as in *Beaumont's Caſe* (*b*), in the caſe of *Stone v. Newman* (*c*), and in *Cuppledick's Caſe* (*d*). Now this rent is a mere poſſibility, and hath no relation to the eſtate of the land. Then again, when the recovery was ſuffered, the rent was not in being: now a recovery will never bar but where the eſtate is dependent upon it either in reverſion or remainder; for by that caſe of *Moor, pl.* 201. I conceive he is barred, becauſe the reverſion is barred by the fine; and alſo by the caſe of *White v. Geriſhe* (*e*) in *Cro. Eliz.* and by the ſame caſe reported 2. *And.* 190. *Noy* 9. Another reaſon is, Becauſe the rent remains in the ſame plight notwithſtanding the fine. Another reaſon is, It was a meer poſſibility at the time of the fine and recovery; and the caſe of *Pell v. Brown* (*f*) is for me. In our caſe there is no eſtate *in eſſe* to be barred. Then this eſtate is granted out of the eſtate of the feoffees; as in *Whitlock's Caſe* (*g*) the eſtates for years which there is a power to make, ſhall be ſaid to * precede all the limitations. There is no other way for ſecuring younger children's portions by the ſame deed, but it may be done by another deed, as in the caſe of *Goodyer v. Clarke* (*h*).

* [109]

MR. FINCH, *contra*. I conceive the rent is barred, upon the reaſon of *Capell's Caſe* (*i*). They ſay not. FIRST, Becauſe it doth only charge the remainder. SECONDLY, The intended recompence doth not go to it. THIRDLY, This leaſe for one thouſand years doth precede the fine. The law will never invert the operation of a conveyance; but *ut res magis valeat: Bredon's Caſe* (*k*). Then, for the intended recompence, that cannot be the reaſon of barring a remainder; for the eſtate-tail was barred before. 3. *Leon.* 157. But *Moor* ſaith (*l*), it is the favour the law hath for recoveries; and till the reverſion takes place in poſſeſſion, the rent cannot ariſe out of the reverſion, nor ſo long as this leaſe is in being.

HALE, *Chief Juſtice*. You make two great points. FIRST, Whether the rent be barred by the common recovery?—SECONDLY, Whether the rent-charge ſhall ariſe out of the leaſe for years? This is plain: If tenant in tail grant a rent-charge, and ſuffer a

(*a*) This exception was alſo overruled. S. C. 2. Lev. 31.
(*b*) 9. Co. 138. 2. Danv. 141. 146.
(*c*) Cro. Car. 427. 460.
(*d*) 3. Co. 5.
(*e*) Cro. Eliz. 727. 768. 792. Owen, 12. 2. And. 170. Moor, 575. Noy, 9.
(*f*) 1. Eq. Ab. 187. Cro. Jac. 590. Brigg. 1. 5. Palm. 135. 2. Roll. Rep. 196. 216. Godb. 282.
(*g*) 8. Co. 71. 1. Brownl. 106.
(*h*) 1. Keb. 73. 169. 246. 462. 1. Sid. 102. 1. Lev. 35.
(*i*) 1. Co. 61. Poph. 5. Moor, 154. Jenk. 250. 1. And. 282. 4. Leon. 150.
(*k*) 1. Co. 76. 2. And. 66. Jenk. 267.
(*l*) Moor's Rep. fo. 73.

common

common recovery, the rent-charge will not be avoided: ſo that if tenant in tail be, rendering a rent, a recovery will not bar that, though it doth a reverſion; but the reaſon of theſe caſes is, becauſe the eſtate of him that ſuffers the recovery is charged with the rent. Therefore if there be a limitation of a uſe upon condition, and *ceſtui que uſe* ſuffer a recovery, that will not deſtroy the condition, the eſtate being charged with it; for the recoveror can have the eſtate only as he that ſuffered the recovery had it; and therefore there is an act of parliament to enable recoverors to diſtrain without attornment. Therefore, ſo long as any one comes in by that recovery, he comes in in continuance of the eſtate-tail, and coming in ſo, he is liable to all the charges of tenant in tail. Now what is the reaſon why tenant in tail ſuffering a common recovery, a rent by him in remainder ſhall be barred? The reaſon is, Becauſe the recoveror comes in in the continuance of that eſtate that is not ſubject to the rent, but is above all thoſe charges; now no recompence can come to ſuch a rent. And therefore there is another reaſon why a common recovery will bar: At common law upon an eſtate-tail, which was a fee-ſimple conditional, a remainder could not be limited over, becauſe but a poſſibility; but now comes that ſtatute *de donis conditionalibus*, and makes *it an eſtate-tail; and a common recovery is an inherent privilege in the eſtate, that was never taken away by that ſtatute *de donis*; the law takes it as a conveyance excepted out of the ſtatute, as if he were abſolutely ſeiſed in fee, and this by conſtruction of law. It is true, there can be no recompence to him that hath but a poſſibility. But the buſineſs of recompence is not material as to this charge; and the reaſon of *White's Caſe (a)*, and other caſes put, explain this. Now what difference between this and *Capel's Caſe (b)*? Say they, There the charge doth ariſe ſubſequent, but here the charge doth ariſe precedent. Why, I ſay, the charge doth ariſe precedent to the remainder, but ſubſequent to the eſtate-tail; for it is not to take effect till the eſtate-tail be determined. It was doubted in the queen's time, whether a remainder for years was barred? But it hath been otherwiſe practiſed ever ſince, and there is no colour againſt it. Now you do agree, That the remainder to the right heirs of one living ſhall be barred, for the eſtate is certain, though the perſon be uncertain; ſo long as the rent doth not come within the compaſs and limitation of the eſtate-tail, the rent is extinct and killed, there is nothing to keep life in it: but whether doth not the leaſe for years preſerve it? Heretofore it was a queſtion among young men, Whether if tenant in tail granted a rent-charge for life, then makes a leaſe for three lives, in this caſe though the rent before would have died with tenant in tail, yet this rent will continue now during the three lives? which it will. And it hath been queſtioned, If he had made a leaſe for years, inſtead of the

BENSON *againſt* HODSON. Cro. Car. 598.

* [110]

(a) White v. Geriſh, Cro. Eliz. 727. 768. 792. Owen, 12. 2. And. 170. Moor, 575. Noy, 9.

(b) 1. Co. 61. Poph. 5. Moor, 154. Jenk. 250. 2. And. 282. 4. Leon. 150.

BENSON *againſt* HODSON.

leaſe for lives, if that would have ſupported the rent? Now in our caſe, if the leaſe for years were chargeable, the rent would ariſe out of that; but if this rent ſhould continue, then moſt men's eſtates in *England* would be ſhaken.

WYLDE, *Juſtice.* The leaſe for years doth not preſerve the rent, but the common recovery doth bar it: for in the caſe of *Pell v. Browne (a)*, the recovery could not bar the poſſibility; for he was not tenant in tail that did ſuffer the recovery, but he had only a fee-ſimple determinable, and the contingent remainder did not depend upon an eſtate tail; nay, did not depend by way of remainder, but by way of contingency: it is true, JUSTICE DODDERIDGE did hold otherwiſe; but the reſt of the Judges gave judgment againſt him upon very good reaſon.

* [111] * TWISDEN, *Juſtice.* I never heard that caſe cited but it was grumbled at.

HALE, *Chief Juſtice.* But to your knowledge and mine they always gave judgment accordingly. A man made a gift in tail, determinable upon his non-payment of a thouſand pounds, the remainder over in tail to *B.* with other remainders; the tenant in tail before the day of payment of the thouſand pounds ſuffered a common recovery, and doth not pay the thouſand pounds; yet becauſe he was tenant in tail when he ſuffered the recovery, by that he had barred all, and had an eſtate in fee by that recovery.

2. Keb. 31. Cruiſeon Recov. 232. 4. Burr. 1929.

At a day after HALE, *Chief Juſtice*, ſaid, the rent was granted before the leaſe for years, and is not to take effect till the eſtate-tail be ſpent, and a common recovery bars it: if there be tenant in tail reſerving rent, a common recovery will not bar it: ſo if a condition be for payment of rent, it will not bar it; but if a condition be for doing a collateral thing, it is a bar *(b)*. And ſo if tenant in tail be with a limitation ſo long as ſuch a tree ſhall ſtand *(c)*, a common recovery will bar that limitation.

(a) Cro. Jac. 590. 1. Eq. Abr. 187. Bridg. 5. Palm. 131. 2. Roll. Rep. 196. 216. Godb 282.

(b) Same point determined in chancery, 10. June, 1743, in the caſe of Reddy *v.* Coleſton.—*Note to the fourth edition.*

(c) See Sanders on Uſes, 193.

Caſe 5. Lampiere *againſt* Mereday.

At what time an *audita querela* may be brought.

S. C. 3. Keb. 291. S. C. 1. Danv. 631. 1. Roll. Abr. 306. 12. Mod. 105. 598. 1. Ld. Ray. 439.

AUDITA QUERELA was brought before judgment entered, which they could not do; which THE COURT agreed: whereupon Counſel ſaid, it was impoſſible for them to bring an *audita querela* before they were taken in execution, for the plaintiff will get judgment ſigned, and take out execution on a ſudden and behind the defendant's back. THE COURT ordered the *poſtea* to be brought in for the defendant to ſee if execution were ſigned. And, at a day after, HALE, *Chief Juſtice*, ſaid, if an *audita querela* be brought after the *day in bank*, though the judgment be not entered up, yet the Court make them enter up the judgment as of that day; ſo that they ſhall not plead "*nul tiel record.*"

The

The Marſhal of the King's Bench *againſt* Middleton. Caſe 6.

WYLDE, *Juſtice*, ſaid, A ſheriff 's bond for *eaſe and favour* was void at common law; and ſo it was declared in *Sir John Lenthall's Caſe*.

Sheriff's bond for *eaſe and favour* void.

1. Sid. 383.

1. Saund. 181. 318. 1. Vent. 237. 1. Lev. 254. See Hard. 464. 2. Lev. 103. 10. Co. 100. Hob. 14.—See the ſtatute 23. *Hen.* 6. c. 9. and the caſe of Rogers *v.* Reeves, 1. Term Rep. 418.

* Stokes *againſt* Verryer. Caſe 7.

TWISDEN, *Juſtice*, upon opening of a record by MR. DENN, ſaid, It was already adjudged in this court *(a)*, that a rent iſſuing out of *gavelkind land* is of the nature of the land, and ſhall deſcend as the land doth.

Gavelkind rent is of the nature of the land.

S. C. 3. Keb. 292.

S. C. Finch C. R. 292. See Robinſon on Gavelkind, 83.

(a) In the caſe of Randal *v.* Jenkins, ante, 96.

Liſter *againſt* Stanley. Caſe 8.

AN ACTION OF DEBT upon a bond. SYMPSON moved in arreſt of judgment. The bond was dated in *March*, and the condition was for payment *ſuper viceſimum octavum diem* MARTII *prox. ſequentem*. It was *ſequentem* which refers to the day, which ſhall be underſtood of the ſame month. If it had been *ſequentis*, then it had referred to *March*, and then it had been payable the next year.—But THE COURT was of opinion, that it ſhould be underſtood the current month. SYMPSON cited a caſe of *Read v. Abington*, wherein he ſaid it had been ſo held.

In debt on a bond dated 20. March, to pay the 28. March *then next following*, it ſhall be intended, after verdict, the *current month*.

S. C. 3. Keb. 291.

1. Roll. Abr. 442.

Ayres *againſt* Lenthall. Caſe 9.

HALE, *Chief Juſtice*. Formerly if execution were gone before a writ of error delivered or ſhewed to the party, it was not to be a *ſuperſedeas*.

A writ of error will remove a judgment after *teſte*, and before execution.

WYLDE, *Juſtice*. He muſt not keep the writ in his pocket, and think that will ſerve.

Notice of a *writ of error* taken out is only a temporary *ſuperſedeas*; for if it be not *allowed* within four days, execution may be taken out.

At another day HALE, *Chief Juſtice*, ſaid, It ſhall not be a *ſuperſedeas* unleſs ſhewed to the party, and he muſt not foreſlow his time of having it allowed; for if it be not allowed by the Court within four days, it is no *ſuperſedeas*.

HALE, *Chief Juſtice*. A writ of error taken out, if it be not ſhewn to the clerk of the other ſide, nor allowed by the Court, is no *ſuperſedeas* to the execution; and if a writ of error be ſued, bearing *teſte* before the judgment be given, if the judgment be given before the return, it is good to remove it (though at firſt

S. C. 3. Keb. 308.

Ante, 28. 45. 106.

Poſt. 285. 1. Vent. 30. 255. 2. Keb. 129. Poph. 122. 6. Mod. 130. 8. Mod. 147. Salk. 321. Stra. 612. 765. 819. 2. Hawk. P. C. 421. See Jaques *v.* Nixon, 1. Term Rep. 279. and Cary *v.* Campbell, 3. Term Rep. 390.

he

ATKINS *againſt* LEMTHALL.

he ſaid it was ſo in reſpect of a *certiorari*, but not of a *writ of error*). And he ſaid, that judgment, whenever it is entered, hath relation to the *day in bank*, *viz.* the firſt day of the Term; ſo that a writ of error returnable after will remove the record whenever the judgment is entered.

Caſe 10.

The King *againſt* St. Andrews, Holbourn.

On *not guilty* to an indictment for not repairing a road, a perſon cannot *give in evidence*, that others are bound to repair it.

UPON a motion concerning the amending of *Leather-Lane*, HALE, *Chief Juſtice*, ſaid, If you plead *not guilty*, it goes to the repair or not repair; but if you will diſcharge yourſelf you muſt do it by preſcription, or *ratione tenuræ*, and ſay, that ſuch a one *ratione tenuræ*, or ſuch part of the pariſh, hath always uſed time out of mind, &c.

S. C. 1. Danv. 787. S. C. 3. Keb. 301. S. C. 1. Vent. 256. S. C. 3. Salk. 183. S. C. 1. Freem. 521. 2. Lev. 112. 1. Sid. 140. 1. Keb. 498. 2. Inſt. 701. 370. 2. Roll. Abr. 597. 10. Mod. 150. 382. 12. Mod. 15. 198. 409. 1. Ld. Ray. 725. 2. Ld. Ray. 922. 1169. 1. Strange, 180. 3. Bac. Abr. 58. Andrews, 276. Annally's Rep. 259. 4. Burr. 2511. 5. Burr. 2702. 1. Hawk. P. C. 369. 2. Term Rep. 106.

* [113]

Caſe 11.

* Backwell *againſt* Bardue.

In debt on bond for the payment of a legacy, the defendant is eſtopped from ſaying the teſtator revoked the will.

AN ACTION OF DEBT upon a bond. The condition was, Whereas one *Bardue* did give by his will ſo much, and if he ſhould pay it ſuch a day, then, &c. The defendant pleads, *bene et verum eſt* he did give him ſo much by his will and teſtament; but he revoked that, and made another laſt will.—THE COURT ſaid, he was eſtopped to plead ſo.—HALE, *Chief Juſtice*. It doth not appear when the bond was made, and it ſhall be intended to be made after the party's death.—Judgment for the plaintiff.

S. C. 3. Keb. 503.

Ante, 15. Moor 420. 1. Roll. Abr. 872. 8. Mod. 33. 323. 12. Mod. 217. 1. Term Rep. 86. 701. 2. Term Rep. 171. 3. Term Rep. 441.

Caſe 12.

Deering *againſt* Farrington.

Hilary Term, 25. & 26. *Car.* 2. *Roll* 221.

If *A.* "*aſſign* "*and transfer*" to *B.* all the money that *ſhall be* allowed in lieu of his ſhare in a ſhip, *B.* may maintain an action againſt *A.* on the *implied covenant* ariſing from the words "*aſſign and transfer*," notwithſtanding the ſubject is *a choſe in action*.—S. C. 3. Keb. 304. 1. Freem. 368. Co. Lit. 213. 265. a. 4. Co. 80. 3. Co. 2. 3. Leon. 178. 8. Mod. 40. 173. 232. 10. Mod. 223. 12. Mod. 554. 2. Ld. Ray. 1242. 2. Bl. Rep. 820. Amb. Rep. 250.

AN ACTION OF COVENANT, declaring upon a deed by which the defendant *aſſignavit et tranſpoſuit* all the money that ſhould be allowed by any order of a foreign State to come to him in lieu of his ſhare in a ſhip.

THOMPSON moved, that an action of covenant would not lie, for it was neither *an expreſs* nor *an implied* covenant. 1. *Leon.* 179.

HALE, *Chief Juſtice*. You ſhould rather have applied yourſelf to this, *viz.* Whether it would not be a good covenant

againſt

againſt the party? As if a man doth *demiſe*, that is an implied covenant; but if there be a particular expreſs covenant, that he ſhall quietly enjoy againſt all claiming under him, that reſtrains the general implied covenant; but it is a good covenant againſt the party himſelf. If I make a leaſe for years reſerving rent to a ſtranger, an action of covenant will lie by the party to pay the rent to the ſtranger.

DERRING *againſt* FARRINGTON.

Then it was ſaid, It was an aſſignment for maintenance.

HALE, *Chief Juſtice.* That ought to have been averred.

Then it was further ſaid, That an aſſignment transferring when it cannot transfer, ſignifies nothing.—HALE, *Chief Juſtice.* But it is a covenant, and then it is all one as if he had covenanted that he ſhould have all the money that he ſhould recover for his loſs in ſuch a ſhip.—TWISDEN, *Juſtice*, ſeemed to doubt.—But judgment.

* [114]

* Lord Mordaunt *againſt* Earl of Peterborough. Caſe 13.

TRIAL AT BAR, on an iſſue out of chancery. The queſtion was, Whether the *Earl of Peterborough* was tenant for life only of the manor of *Mayden?* The defendant did not appear. The plaintiff thereupon deſired to examine his witneſſes, that ſo he might preſerve their evidence.—TWISDEN, *Juſtice.* When they do not appear, what good will that do you? for they will ſay, you ſet up a man of ſtraw, and pull him down again.

The teſtimony of witneſſes cannot be perpetuated by a *viva voce* examination at common law.

There was a former deed of entail with a power of revocation in it, and after the deed exhibited was made, whereby the eſtate was otherwiſe ſettled, and there was a jointure to the preſent lady, and done by perſons of great learning in the law: the revocation was to be by deed under my lord's hand and ſeal in the preſence of three witneſſes. Now the queſtion was, Whether this ſecond deed was a revocation in law, and an execution of that power?—And THE COURT told THE COUNSEL that the jury ſhould find it ſpecially if they would; but they refuſed.

A deed contains A PROVISO that *A.* by the conſent of his wife in writing may revoke it; *Quære*, If this *power* is executed by the wife *ſealing* a releaſe, with a clauſe revoking the former deed?

HALE, *Chief Juſtice.* In the caſe of *Snape v. Sturt* (*a*) it was held, that if there be a power of revocation, and a leaſe for years is made, it doth ſuſpend *quoad* the term; but after it is good. Then it hath been queſtioned formerly, if there be ſuch a power, and the perſon make a leaſe and releaſe, Whether it was a revocation? But ſhall we conceive the learned Counſel in this caſe would have ventured upon an implicit revocation, and not have made an expreſs revocation? ſo that you muſt be nonſuit, or find it ſpecially.

S. C. ante, 94. S. C 3. Keb. 1. 305. 2. Roll. Abr. 263. Cro. Car. 472. W. Jones, 392. Co. Lit. 237. Pow. on Pow. 17. 112.

5. Com. Dig. 632. 1. Peer. Wms. 164. Comyns, 254. 3. Ch. Caſes, 126. 2. Term Rep. 684. 3. Term Rep. 665. and ſee Sprange v. Barnard, 2. Brown's Chan. Caſes, 505. and Macadam v. Logan, 3. Brown's Chan. Caſes, 310.

(*a*) Cro. Car. 472. 2. Roll. Abr. 215. 262. 701. 1. Jones, 392.

But

But the iſſue being, If he were only tenant for life? he ſaid, he muſt go back to the chancery to amend it; for by the deed produced, he hath an eſtate for life and the reverſion in fee.

An iſſue whether "tenant "for life;" is not proved, by evidence of a tenancy for life with reverſion in fee.—S. C. 3. Keb. 305.

Caſe 14.

Burgis *againſt* Burgis.

In Chancery.

* [115] A MAN having a long LEASE, ſettled it in truſt upon himſelf for life, the remainder to his wife for life, the remainder to the firſt ſon of their two bodies, the remainder to the ſecond ſon, and ſo to the tenth ſon; and if they * ſhould have no ſon or ſons, then the remainder to ſuch daughter and daughters of their bodies, &c. The man and his wife died, and left only a daughter, who preferred her bill againſt the truſtees for the executing of this remainder to her.

If a grant be made of *a term of years* to *A.* for life, with remainder to *A.* and *B.* his wife for life; remainder to the firſt *ſon* of their two bodies, and ſo on to their other ſons ſucceſſively; and if they ſhould have no ſons, then with remainder over to their *daughters*, the remainder is void, although *A.* and *B.* never have *a ſon*, but *a daughter* only;

The queſtion was, Whether this remainder be a good remainder, or whether it be void?

FINCH, *Lord Keeper*, held it was a void remainder, becauſe it doth depend upon ſo many and ſuch remote contingencies, for otherwiſe it would be A PERPETUITY. And he ſaid, he would allow one contingency to be good, *viz.* that to the firſt ſon, though the firſt ſon was not *in eſſe* at the time of his deceaſe. And he cited a caſe in *Dyer*; and *Matthew Manning's Caſe (a)*; and *Leon Lovie's Caſe (b)*; and *Lampett's Caſe (c)*; and the caſe of *Child v. Bayly (d)*.

for ſuch remote contingencies tend to create *a perpetuity*.—S. C. 1. Chan. Caſes, 492. S. C. Pollexf. 40. S. C. Finch C. R. 91. See ante, 55. note (*a*). 1. Sid. 37. 45c. 1. Vent. 39. 3. Mod. 28. 93. 101. 124. 10. Mod. 402. 419. 12. Mod. 44. 52. 278. 283. 592. Gilb. Eq. Rep. 75. 79. 105. Abr. Eq. 191. 1. Vern. 234. 304. 462. 2. Vern. 600. Fitzg. 324. Prec. Chan. 455. Caſ. Temp. Talb. 21. 1. Peer. Wms. 98. 132. 198. 432. 500. 534. 574. 664. 748. 2. Peer. Wms. 421. 608. 618. 622. 3. Peer. Wms. 213. 258. 300. 1. Ch. Rep. 28. 2. Com. Dig. "Chancery" (4. W. 20.). 1. Bro. Ca. Ch. 294. Dougl. 264. 2. Term Rep. 720. 3. Term Rep. 83. 87. 143. 356. 484. 763. 1. Brown's Chan. Caſes, 170. 187. 2. Brown's Chan. Caſes, 127. Caſes Temp. Talbot, 3d edition, page 27.

And he ſaid, he did deny LORD COKE's opinion in *Leon Lovie's Caſe (e)*, which ſaith, that in caſe of a leaſe *ſettled* to one

A *term* deviſed *de novo* out of the inheritance, to *A.* and the heirs male of his body, does not determine by his death without iſſue, but, like a term *in groſs*, ſhall go to his executors.—See the Caſe of Clare *v.* Clare, Caſes Temp. Talb. 22.

(*a*) 8. Co. 94. Co. Ent. 149.
(*b*) 2. Roll. Abr. 419. 792. 10. Co. 78. Moor 772. 2. Brownl. 103. Cro Jac. 61.
(*c*) 2. Roll. Abr. 404. 10. Co. 46. 2. Brownl. 172. Winch. Ent. 426.
(*d*) 1. Eq. Abr. 192. 2. Roll. Rep. 329. Palm. 48. 333. Cro. Jac. 459. 1. Jones, 15.—But this caſe is denied to be law, Carth. 267.; and by L. C. NOTTINGHAM, in the duke of Norfolk's Caſe, 3. Chan. Rep. 35. See alſo 2. Ld. Ray. 150. 4. Term Rep. 69.
(*e*) 2. Roll. Abr. 419. 792. 10. Co. 78. Moor, 772. 2. Brownl. 103. Cro. Jac. 61.

and

and the heirs males of his body, when he dies the estate is determined, for he said it shall go to his executors (*a*). And he said, there was the same case with this in this court, *Backhurst v. Bellingham* (*b*). BURGIS *against* BURGIS.

And he said, that the common law did complain that this Court did encroach upon them, whereas they are beholden to this Court for their rules in equity; as formerly, when ecclesiastical persons made leases, *a misnomer* would avoid them; but ELSMERE, *Lord Chancellor*, in his time would, notwithstanding the *misnomer*, make them good.

(*a*) Moor, 809. 1. Roll. Abr. 611. Pollex. 24. 10. Co. 87. 1. Sid. 37. Cas. Chan. 230. 1. Salk. 231. and 1. Peer. Wms. 366. 2. Com. Dig. "Chancery" (4. W. 21.). 3. Chan. Cas. 30. Sheph. Touch. 446. Co. Litt. 20. a. note (5). Fearne, 342.
(*b*) Pollexf. 33.

Freeman *against* Taylor. Case 15.

A judgment against a mortgagee obtained subsequent to the mortgage, does not attach upon *assets* produced by a release of the equity of redemption.

A NOTHER CASE IN CHANCERY. One mortgaged lands, then confessed a judgment, and died. The mortgagee buys of the heir the equity of redemption for two hundred pounds. The bill was preferred by the creditor by judgment against the mortgagee and heir, either to be let in by paying the mortgage-money, or else that the two hundred pounds received by the heir, might be assets.—And THE COURT said, that the mortgagee's estate should not be stirred; but it was left by FINCH, *Lord Keeper*, to be made a case, Whether the two hundred pounds should be assets in the hands of the heir (*a*)?

S. C. 3. Keb. 307. 3. Lev 286. 1. Show. 244. 10. Mod. 12. 254. 426. 462. 477. 487. 11. Mod. 5. 12. Mod. 346. 381. 611. 2. Vern. 61. Fitzg. 41. 103. 142. Prec. Chan. 39. Abr Eq. 241. Cases Temp. Talb. 220. 1. Ld. Ray. 53. 1. Peer. Wms. 34. 201. 355. 678. 730. 775. 2. Peer. Wms. 145. 364. 381. (620.). 542. 3. Peer. Wms. 9. 166. 217. 330. 341. 401.

(*a*) *Sed quære*, If this distinction of judgment being obtained *after* the mortgage, be not, in this respect, done away? Cole v. Warden, 1. Vern. 410.; Pluckner v. Kirk, 1. Vern. 411.; Smith v. Angel, 2. Ld. Raym. 783. 1. Salk. 354. 7. Mod. 40. 1. Powel's Mortgages, 286. 291. See also 2. Peer. Wms. 412. 2. Atk. 50. 2. Black. Rep. 1230. 1. Brown's Cases Chan. 246. 256.

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* The Case of Mosedell, the Marshal of the King's Bench. Case 16.

On a *habeas corpus ad testificandum* directed to a gaoler to carry a prisoner to the assizes, if he permit him to go at large under colour of the writ, it is an escape, notwithstanding the prisoner return into custody; but if *nil debet* be pleaded, the gaoler may give *fresh suit* in evidence.—S. C. 3. Keb. 305. 1. Sid. 13. 3. Co. 45. Cro. Car. 14. Dalt. Sh. 561. Comyns, 422. 554. 6. Mod. 78. 8. Mod. 120. 10. Mod. 394. 11. Mod. 50. 69. 79. 93. 12. Mod. 31. 227. 583. 634. 1. Ld. Ray. 241. 399. 2. Ld. Ray. 788. 3. Com. Dig. "Escape" (c). 2. Bl. Rep. 1048. Gilbert's Evidence, 283. 2. Term Rep. 5. 126.

A TRIAL AT BAR; an action of debt brought against *Mosedell* for the escape of one *Reynolds*. The plaintiff said, he could prove that he was at *London* three long vacations.

TWISDEN,

THE CASE OF MOSEDELL, THE MARSHAL OF THE KING'S BENCH.

TWISDEN, *Juſtice.* It is hard to put three eſcapes upon THE MARSHAL, for he may be provided only for one, and he cannot give in evidence *a freſh purſuit*, but it muſt be pleaded.

HALE, *Chief Juſtice.* I always let them give in evidence *a freſh purſuit* upon a *nil debet.*

And WYLDE, *Juſtice*, ſaid, it was generally done (*a*).

So they gave evidence of an *habeas corpus ad teſtificandum*, and that the priſoner went down too long beforehand, and ſtaid too long after the aſſizes were done at *Wells* in *Somerſetſhire*, and that he went back threeſcore miles beyond *Wells* before he returned again for *London.*

HALE, *Chief Juſtice.* If an *habeas corpus* be granted to bring a perſon into court, and the ſheriff let him go into the country, it is an eſcape. And though he be not bound to bring him the direct way, becauſe he may be reſcued, yet he ought not to carry him round-about a great way for the accommodation of the party; if he doth, it is an eſcape; but by this evidence you let him go back threeſcore miles, to which there can be no anſwer. An *habeas corpus* returnable *immediatè* is not fixed to an hour, but to a convenient time.—They anſwered, that he went back to carry back ſome writings (*b*).

COUNSEL. Here is an eſcape of one of the parties, who dies before th action brought, whereby the whole charge is ſurvived to the ot r before the action brought; and, Whether this ſhall purge th eſcape? is the queſtion; or, How far it ſhall purge it?

WYL E, *Juſtice.* Before you brought your action the debt is gone, as the eſcape.

HALE *Chief Juſtice.* We are made the engines of doing all the miſc ef if this ſhall go unpuniſhed, being by colour of an *habeas cor s.*

The jury brought in a verdict for the plaintiff, who declared in debt for ſix thouſand two hundred pounds.

(*a*) But now by 8. & 9. Will. 3. c. 27. ſ. 6. "No retaking on *freſh purſuit* ſhall be given in evidence in any "action of eſcape againſt THE MARSHAL of the King's Bench, or THE "WARDEN of the Fleet priſons, or "THE KEEPER of any other priſon, "unleſs the ſame be *ſpecially pleaded*; "nor ſhall ſuch ſpecial plea be received, "unleſs oath in writing be firſt made "and filed by the marſhal, &c. in the "office of the reſpective courts, that "ſuch eſcape was without his conſent, "privity, or knowledge; and if ſuch "affidavit ſhall afterwards appear to be "falſe, the deponent, on conviction, "ſhall forfeit FIVE HUNDRED POUNDS."
See alſo the ſtatutes 27. Geo. 2. c. 17. and the 1. Ann. c. 6.

(*b*) Letting a man that was arreſted go to the next houſe, which was ſituated in another juriſdiction, held to be an eſcape, Hilary Term, 12. Geo. 2. B. R. *inter* Sheriff of Hampſhire and Godfrey.—*Note to the fourth edition.*

Green

* Green *againſt* Proude.

Caſe 17.

IN EJECTMENT ON A TRIAL AT BAR, the firſt queſtion was, Whether a will or no will? The plaintiff produced a deed indented, made between two parties, the man and his ſon: and the father did agree to give the ſon ſo much, and the ſon did agree to pay ſuch and ſuch debts and ſums of money: and there were ſome particular expreſſions reſembling the form of a *will*; as, that he was ſick of body, and did give all his goods and chattels, &c. but the writing was both ſealed and delivered as *a deed*; and they gave evidence, that he intended it for his laſt will; which, THE COURT ſaid, was a good proof of his will *(a)*.

A written inſtrument, tho' in form *a deed*, if in ſubſtance *a will*, may be given in evidence as *a will*.

S. C. 3. Keb. 310. S. C. 1. Vent. 257. S. C. 2. Danv. 539.

Plo. 344. Moor, 177. 341. 356. Cro. Jac. 145. Cro. Eliz. 100. 2. Leon. 35. Allen, 2. 55. 1. Ch. Caſ. 248.

(*a*) By 29. Car. 2. c. 3. "All deviſes of lands and tenements ſhall not only be in writing, but ſigned by the teſtator, or ſome other perſon in his preſence and by his expreſs direction, and be ſubſcribed, in his preſence, by three or four credible witneſſes." See 3 Lev. 1. Freem. 486. 2. Chan. Caſes, 109. Prec. in Chan. 185. 1. Peer. Wms. 740. 1. Vezey, 127. Gilb. Evid. 4th edit. 74. 1. Burr. 548. Pow. on Dev. 14.

SECONDLY, The defendant then ſetting up an entail, the plaintiff exhibited an exemplification of a recovery in the *Marquis of Wincheſter's court* in *ancient demeſne*. The other ſide objected, that they did not prove it a true copy.—But becauſe it was ancient, THE COURT ſaid, they ſhould not be ſo ſtrict upon the evidence of it; for the other ſide ſaid, the court-rolls were burned in *Baſing-houſe*, in the time of the Wars.—HALE, *Chief Juſtice*. I remember a caſe, where one had gotten a preſentation to the parſonage of *Goſnall*, in *Lincolnſhire*, and brought a *quare impedit*, and the defendant pleaded an appropriation; there was no licenſe of appropriation produced, but becauſe it was ancient, the Court would intend it.

An exemplification of the court-rolls of a recovery in *ancient demeſne* ſhall be received in evidence, if the original record be deſtroyed.

3. Leon. 79. 3. Co. 31. Allen, 2. 55. 1. Roll. Abr. 618. 1. And. 34. 1. Atk. 446. Gilb. Ev. 22.

1. Sid. 315. 362. Hardres, 323. 10. Co. 92. b. 98. a. Salk. 285. Bull. N. P. 228. 230. 1. Stra. 185. 526. 1. Wilſ. 48. 3. Com. Dig. 277. 2. Term Rep. 41.

See 10. Ann. c. 18. and 8. Geo. 2. c. 6. ſ. 21. and 14. Geo. 2. c. 20. ſ. 4.

THIRDLY, Then they objected, that they ought to prove ſeiſin in the tenant to the *præcipe*.—HALE, *Chief Juſtice*. It being an antient recovery, we will not put them to prove that. He ſaid, the *Mayor of Briſtol* had offered in evidence an exemplification of a recovery under the town-ſeal of houſes in *Briſtol*, the records being burned; and that exemplification was allowed for evidence.

If poſſeſſion has continued from the time of an ancient recovery, the Court will preſume a ſurrender by tenant for life to make a tenant to the *præcipe*.—S. C. 1. Vent. 257. 1. Ch. Ca. 292. Cro. Jac. 455. Cruiſe, 31. 1267. 2. Burr. 1065. Pigot on Recov. 41. Lutw. 1549. 2. Atk. 44. 2. Stra. 1129.

FOURTHLY,

Fine levied by tenant for life is a forfeiture, but not by tenant in tail.

FOURTHLY, HALE, *Chief Juſtice*, If *tenant in tail* accept a fine *come ceo, &c.* this doth not alter his eſtate: if *tenant for life* accept of a fine *ſur conuſance, &c.* he doth forfeit his eſtate; but it doth not alter the eſtate for life.

2. Co. 55. b. 56. a. 9. Co. 106. 1. Roll. Abr. 852. Co. Lit. 252. 2. Lev. 202. 3. Leon. 264. 4. Leon. 217. Dyer, 148.

A recovery of lands in *ancient demeſne*, deſcribing them as lying in *Dale*, although there are ſeveral *vills* in the pariſh, is good. Ante, 78.

FIFTHLY, The recovery is of land in *Kingſcleare*, whereas the land claimed is in a particular vill called———; and the vills are ſeveral, and there are diſtinct courts in every vill.—HALE, *Chief Juſtice*. There are ſeveral tithings of *Dale*, *Sale*, and *Downe*; there is a tithing-man in every particular place; but the conſtable of *Dale* goes through all; theſe may go for ſeveral vills, or one vill: * there may be a manor that hath ſeveral little manors within it, wherein are held ſeveral courts for the eaſe of the tenants, but all but one manor; and a writ of right cloſe is, *quòd plenam rectam, &c.* and runs to the bailiff of the manor, and may extend to the precinct of the whole manor; as the manor of *Barton* hath ſeveral little manors under it, yet all within the manor. Where there is a writ of *right cloſe* in *antient demeſne*, it is not like a demand to a ſheriff here, where he hath his direction for ſo many acres.—MAYNARD, *Serjeant*. But then he muſt demand it in the particular vill where it is.—HALE, *Chief Juſtice*. If a *præcipe quod reddat* be of land in *a pariſh* where it muſt be in *a vill*, there may be exception to the writ; but if he recover, it is good, for now the time is paſt: and ſo where it is *infra manerium*, if he recover, it is good.

* [118]

Caſe 18. Browne's Caſe.

Venue changed after cauſe removed.

AN ACTION brought in *Canterbury-town*: the defendant removes it by *habeas corpus*: then the plaintiff declares here. It was moved that it might be tried in ſome other county, becauſe the Judges came there ſo ſeldom.—THE COURT. Let them ſhew cauſe why they ſhould not conſent; and if they will plead *nil debet*, the plaintiff will be willing to let them give any thing in evidence.

In debt for rent, *entry nd ſuſpenſion* may be given in evidence of the general iſſue of *nil debet*.

SIMPSON ſaid, It was the opinion of all the Judges, that, upon *nil debet* pleaded, entry and ſuſpenſion may be given in evidence, which the Court did not deny:—ſo THE COURT ordered the other ſide to ſhew cauſe why they ſhould not conſent.

—Ante, 7. 35. 2. Roll. Abr. 677. 1. Leon. 104. 2. Sid. 151. 1. Vent. 358. Cro. Eliz. 222. 1. Gilb. Evid. Loffi's edit. 335. Cowp. 242.

Caſe 19. Hillyard's Caſe.

An attorney cannot ſue in an inferior court for his bill of coſts in king's bench.

HILLYARD, *an Attorney*, ſued for his fees in this court, in the court at *Briſtol*.—But THE COURT ſaid, An attorney ought not to wave this court.

—S. C. 3. Keb. 386. Ante, 23. 1. Lev. 54. 11. Mod. 167. 12. Mod. 251. 1. Com. Dig. "Attorney" (B. 17.). Dougl. 381. 3. Term Rep. 573. 4. Term Rep. 24. 496. and the ſtatute 3. Jac. 1. c. 7. and 2. Geo. 2. c. 23. ſ. 23.

* Buſhell's Caſe. Caſe 20.

A MOTION was made by SIR WILLIAM JONES for the *Lord Mayor Starling* and the *Recorder Howell:* one *Buſhell* brought an action againſt them for falſe impriſonment; and becauſe the plea was long, he prayed he might have time to plead.

An action will not lie againſt a magiſtrate for falſe impriſonment, in conſequence of acts done by him in the character of a Judge.

HALE, *Chief Juſtice.* I ſpeak my mind plainly, that an action will not lie; for a *certiorari* and an *habeas corpus*, whereby the body and proceedings are removed hither, are in the nature of a *writ of error*; and in the caſe of an erroneous judgment given by a Judge which is reverſed by a writ of error, ſhall the party have an action of falſe impriſonment againſt the Judge? No, nor againſt the officer neither. The *habeas corpus* and writ of error, though it doth make void the judgment, it doth not make the awarding of the proceſs void to that purpoſe; and the matter was done in a courſe of juſtice: they will have but a cold buſineſs of it. An *habeas corpus* and *certiorari* is a *writ of right*, the higheſt writ the party can bring.—So day was given to ſhew cauſe.

S. C. poſt. 184. S. C. 2. Jones, 13. S. C. Vaugh. 135. S. C. 3. Keb. 322. S. C. Freem. 1. Poſt. 145. 184. 12. Co. 24. 2. Mod. 218. Salk. 396.

12. Mod. 386. 2. Bl. Rep. 1145. 1. Ld. Ray. 454. 468. 470. Cowp. 476. Johnſton v. Sutton, 1. Term Rep. 493.

Lord Teynham *againſt* Mullins. Caſe 21.

Hilary Term, 25. & 26. Car. 2. Roll 28.

A TRIAL AT BAR about a fraudulent deed (*a*).—HALE, *Chief Juſtice.* There are three things to be conſidered, *fraud, conſideration*, and *bona fide*: now the *bona fide* is oppoſite to *fraud.* I remember a caſe in *Twine's Caſe* (*b*); if the ſon be diſſolute, and the father with advice of friends doth ſettle things ſo that he ſhall not ſpend all, though there be not a conſideration of money, yet it is no fraudulent deed; and a deed may be voluntary, and yet not fraudulent, otherwiſe moſt of the ſettlements in England would be avoided.—And ſo ſaid TWISDEN, *Juſtice.*

A deed may be *voluntary*, and yet not *fraudulent.*

S. C. 3. Keb. 322. S. C. 2. Lev. 105. Ante, 76. Abr. Eq. 170. 9. Mod. 80. 96.

Gilb. Eq. Rep. 122. Prec. in. Chan. 84. 10. Mod. 247. 469. 471. 478. 489. 497. 1. Vern. 46. 2. Vern. 473. Caſes Temp. Talb. 65. Comyns, 255. 1. Peer. Wms. 60. 204. 354. 577. 581. 2. Peer. Wms. 171. 255. 358. 464. 606. 3. Peer. Wms. 222. 337.—A voluntary deed may be good againſt the party who made it, though it might be ſet aſide as againſt creditors or a fair purchaſor. Boughton v. Boughton, in chancery, 5. December, 1739, reported 1. Atkins, 625.

(*a*) The caſe was thus: *Lord Teynham*, being ſeiſed in fee, in conſideration of marriage between his eldeſt ſon and *A. Engleſield*, and of a marriage-portion of 5000l. to be paid, which was afterwards paid, made a ſettlement on his ſaid ſon, and the heirs of his body upon the ſaid *A. Engleſield* begotten; remainder to his ſecond ſon in tail; remainder to his own right heirs. *Lord Teynham* was at this time in debt, and three years afterwards he ſold the lands for a valuable conſideration, and died. The eldeſt ſon and his wife alſo died without iſſue. The queſtion was, Whether, under theſe circumſtances, the remainder limited to the ſecond ſon was *fraudulent* as againſt *a purchaſor* with notice of the ſettlement, a covenant being inſerted in the conveyance to him againſt all incumbrances, ſave this remainder to the ſecond ſon, againſt which he had taken a collateral ſecurity?—THE COURT were of opinion, that the deed, as to this remainder, was not *fraudulent.* See Cadogan v. Kennet, Cowp. 434.; Doe v. Routledge, Cowp. 705.; Stephens v. Oliver, 2. Brown's Chan. Caſes, 90.; Evelyn v. Templar, 2. Brown's Chan. Caſes, 148. 3. Brown's Chan. Caſes, 12.

(*b*) 3. Co. 80. Cro. Jac. 179.

Caſe 22.

* Blackburne *againſt* Graves.

Hilary Term, 24. & 25. *Car.* 2. *Roll* 1216.

A copyholder having a daughter by his firſt wife, and a ſon and a daughter by his ſecond wife, ſurrenders his eſtate to his eldeſt daughter for five years, with remainder to his own right heirs, and dies. The daughter is admitted. The ſon dies. The five years expire. The admittance of the daughter is the admittance of the ſon in remainder as right heir; and he being ſo ſeiſed creates a *poſſeſſio fratris*, which occaſions the eſtate to *deſcend* to his ſiſter of the whole blood only; and not to his two ſiſters together, as heirs to their father. —But this *conſtructive admittance* of the remainder-man ſhall not prejudice the lord's fine.

TROVER for one hundred loads of wood. On not guilty pleaded, a ſpecial verdict was found, that the lands are copyhold lands, and ſurrendered to the uſe of one for eleven years, the remainder for five years to the daughter, the remainder to the right heirs of the tenant for eleven years. The eleven years expire; the daughter is admitted; the five years expire: and there being a ſon and daughter by one venter, and a ſon by another venter, the ſon of the firſt venter dies before admittance, and the daughter of the firſt venter and her huſband bring *trover* for cutting down of trees.

The queſtion was, If the admittance of tenant for years was the admittance of the ſon in remainder?

LEVINZ. I conceive it is; and then the ſon is ſeiſed, and the daughter of the whole blood is his heir; and he cited the caſe of *Gypping v. Bunny* (*a*).

WYLDE, *Juſtice*. The eſtate is bound by the ſurrender.

HALE, *Chief Juſtice*. If a man doth ſurrender to the uſe of *John Styles*, till admitted there is no eſtate in him, but remains in the ſurrenderor; but he hath a right to have an admittance: if a ſurrender be to *J. S.* and his heirs, his heir is in without admittance if *J. S.* dies. About this there hath indeed been diverſity of opinions, but the better opinion hath been according to LORD COKE's opinion. I do not ſee any inconvenience why the admiſſion of tenant for life or years ſhould not be the admittance of all in remainder, for fines are to be paid, notwithſtanding, by the particular remainders; and ſo the Books ſay it ſhall be no prejudice to the lord.

TWISDEN, *Juſtice*. I think it is ſtrong, that the admiſſion of leſſee for years is the admiſſion of him in remainder; for as in a caſe of *poſſeſſio fratris* the eſtate is bound, ſo that the ſiſter ſhall be heir; ſo here the eſtate is bound, and goes to him in remainder.

HALE, *Chief Juſtice*. It ſhall not prejudice the lord; for if a fine be aſſeſſed for the whole eſtate, there is an end of the buſineſs; but if a fine be aſſeſſed only for a particular eſtate, the lord ought to have another. If a ſurrender be to the uſe of *A.* for life, the remainder to his eldeſt ſon, &c. or to the uſe of *A.* and his heirs, and then *A.* * dies, the eſtate is in the ſon without admittance, whether he take by *purchaſe* or *deſcent*.—And judgment was given accordingly.

S. C. ante, 102. S. C. 3. Keb. 263. 329. S. C. 1. Vent. 260. S. C. 2. Lev. 107.

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S. C. 2. Danv. 185.

4. Co. 22. Dyer, 292. 2. Roll. Abr. 502. Moor, 125. 272. 3. Leon. 70. 4. Leon. 38. 3. Lev. 308. 1. Roll. Abr. 502. 1. And. 122. Fitzg. 287. 1. Peer. Wms. 63. 2. Ld. Ray. 1024. 1224. Stra. 445. 487. 1. Burr. 212. Gilb. Tenures, 162. 194. Dyer, 291.

(*a*) Cro. Eliz. 504. Moor, 465. Gouldſb. 95. Co. Copyh. 72.

Draper

Draper *againſt* Bridwell. Caſe 23.

Eaſter Term, 26. Car. 2. Roll 320.

ALL THE COURT held, that an action of debt will lie upon a judgment, after a writ of error brought.

Debt lies on a *judgment* after *error* brought.

S. C. 3. Keb. 330. 2. Vent. 261. Dougl. 6.

Peters *againſt* Prideux. Caſe 24.

TWISDEN, *Juſtice.* They in the ſpiritual court will give ſentence for tithes for *rakings*, though they be never ſo involuntarily left; which our law will not allow of.

Rakings are not titheable.

S. C. 3. Keb. 251. 284. 332. 427. 1. Roll. Abr. 645.

Ireton *againſt* Newton. Caſe 25.

WYLDE, *Juſtice*, ſaid, That actions perſonally tranſitory, though the party doth live in *Cheſter*, yet they may be brought in the king's courts.

Tranſitory actions may be in *B. R.* though the party live in *Cheſter*.—S. C. 3. Keb. 333. Cowp. 177.

The Mayor of London *againſt* Depeſtre. Caſe 26.

HALE, *Chief Juſtice.* Shew a precedent where a man can *wage his law* in an action brought upon a preſcription for a duty; as in action of *debt* for *toll (a)* by preſcription, you cannot wage your law.

Ley-gager is not allowed in an action of debt upon a preſcription for a duty.—S. C. 3. Keb. 337. S. C. 2. Lev. 106. S. C. 1. Vent. 261. 3. Mod. 303. 11. Mod. 187. 12. Mod. 669. 681. 1. Ld. Ray. 500. 2. Ld. Ray. 992.

(a) Dougl. 728. notis, 1. Term Rep. 616.

Pybus *againſt* Mitford. Caſe 27.

HALE, *Chief Juſtice*, delivered his opinion, WYLDE, RAINSFORD, and TWISDEN, *Juſtices*, having firſt delivered their's.

If *A.* covenant to ſtand ſeiſed " to the uſe of " the heirs male " of the body " of the ſaid *A.* " begotten, or " to be begotten, on the " body of *B.* " his wife, " with reverſion to his " own right heirs," *A.* ſhall take an eſtate *for life* by *implication*, in order to make a good *remainder* in tail.—S. C. ante, 98. S. C. poſt. 159. S. C. 3. Keb. 239. 316. 338. S. C. 2. Lev. 75. S. C. Ray. 228. S. C. 1. Vent. 372. S. C. 1. Freem. 351. 369. Poſt. 237. Prec. in Chan. 54. 342. 467. 2. Salk. 679. 6. Mod. 134. 2. Ld. Ray. 854. 3. Salk. 336. 11. Mod. 289. 2. Peer. Wms. 1.

HALE. I think judgment ought to be given for the defendant, whether the ſon take by *deſcent* or by *purchaſe*. I ſhall divide the caſe: FIRST, Whether the ſon doth take by deſcent? SECONDLY, Admitting he doth not, whether he can take by purchaſe? We muſt make a great difference between conveyances of eſtates by way of uſe, and at common law. A man cannot convey to himſelf an eſtate by a conveyance at common law, but by way of uſe he may. But now in our caſe here doth return by ope-

PYBUS *against* MITFORD.

ration of law, an estate to *Michael* for his life, * which is conjoined with the limitation to his heirs. The reason is, Because a limitation to the heirs of his body, is in effect to himself. This is perfectly according to the intention of the parties. It is objected, that the use being never out of *Michael*, he hath the old use, and so it must be a contingent use to the heirs of his body. But I say, We are not here to raise a new estate in the covenantor, but to qualify the estate in fee in himself; for the old estate is to be made an estate for life, to serve the limitation. Further objection is, that it shall be the old estate in fee; as if a man devise his lands to his heirs, the heir is in of the old estate. But I answer, If he qualify the estate, the son must take it so; as in *Hutton*, *fol.* 60. 85. so in this case is a new qualification: 1. *Roll. Abr.* 789. 15. *Jac.* If a man make a feoffment to the use of the heirs of the body of the feoffor, the feoffor hath an estate-tail in him; *Pannell v. Fenne (a)*, *Englefield v. Englefield (b)*. SECONDLY, I conceive, if it were not possible to take by descent, this would be a contingent use to the heirs of the body. Objection is, that it is limited to the heir, when no heir in being. Why, I say, it would have come to the heir at common law, if no express limitation had been; and it cannot be intended, that he did mean an heir at common-law, because he did specially limit it.

Gilb. Dev. 99.

(a) Moor. 350. Cro. Eliz. 347.

(b) Moor, 303. Poph. 18. 7. Co. 11. Jenk. 267. 4. Leon. 135. 169.

Case 28. Craig *against* Norfolk.

Recovery of damages for disturbance of office, is sufficient evidence of *seisin* in an *assise* against *the same* defendant.

TRIAL AT BAR OF AN ASSISE for the serjeant at mace's place in the house of commons. The plaintiff had his patent read; and THE COURT asked, If they could prove *seisin*? To which the plaintiff's counsel answered, That they had recovered in an action upon the case for the mean profits, and had execution.—PER CURIAM, For aught we know, that will amount to a seisin.

8. C. 3. Keb. 326. 343. 8. C. 2. Lev. 108. 120. 8 C. Lilly Ent. 47. Carth. 169.

TWISDEN, *Justice*. Upon your grant, since you could not get actual seisin, you should have gone into chancery, and they would have compelled him to give you seisin.

HALE, *Chief Justice*. A man may bring an action upon the case for the profits of an office, though he never had seisin.

2. Term Rep. 355.

To maintain an assise for a *patent office*, the party must prove a *seisin in law*.

The record was read of his recovery in an action upon the case for the profits.—HALE, *Chief Justice*. This is but a seisin in law, not a seisin in fact.

1. Roll. Abr. 270. 4. Co. 10. a.

The counsel for the plaintiff much urged, that the recovery and execution had of the profits, was a sufficient seisin to entitle them to an assise.

2. Salk. 468. Cowp. 502. 2. Term Rep. 355.

It,

It was objected, * that the plaintiff was never inveſted into the office.—HALE ſaid, an inveſtiture does not make an officer when he is created by patent, as this is; but he is an officer preſently. But if he were created an herald at arms (as in *Segar's Caſe*), he muſt be inveſted before he can be an officer: a perſon is an officer before he is ſworn. The defendant is the pernor of the profits, and you have recovered damages: is not this a ſeiſin againſt you? The Jury ſhall find it ſpecially.—But the plaintiff choſe rather to be nonſuit, becauſe of the delay by a ſpecial verdict.

In an *elective* office the party muſt be *inveſted* to gain *poſſeſſion*; but in an office by *patent* he is *in* by the creation.

1. Leon. 248. 10. Mod. 66. 74. 290. Co. Lit. 9. a.

12. Mod. 199. Fitzg. 293. 3. Bac. Abr. 726. 1. Ld. Ray. 51. 159. 163. 563. 2. Bl. Com. 317.

And THE COURT told them, they could not withdraw a juror in an aſſiſe, for then the aſſiſe would be depending.

A juror cannot be withdrawn in *an aſſiſe*.

The Roll of the action upon the caſe was in *Michaelmas Term*, in the nineteenth year of *Charles* the Second, *Roll* 557.

TRINITY TERM,

The Fifteenth of Charles the Second,

IN

The Exchequer Chamber.

Friday, 19. *June*, 1663.

KING'S BENCH.	COMMON PLEAS.
Sir Robert Forbes, *Knt. Chief Juſtice.*	*Sir* John Vaughan, *Knt. Chief Juſtice.*
Sir Tho. Mallett, *Knt.* (*a*) }	*Sir* Robert Hyde, *Knt.* }
Sir Tho. Twiſden, *Knt.* } *Juſtices.*	*Sir* Tho. Tyrrell, *Knt.* } *Juſtices.*
Sir Wad. Wyndham, *Knt.* }	Samuel Brown, *Eſq.* }

EXCHEQUER.

Sir Orlando Bridgman, *Knt. Chief Baron.*

Sir Edward Atkins, *Knt.*
Sir Chriſtopher Turner, *Knt.* } *Barons.*
Sir Richard Rainsford, *Knt.*

(*a*) MR. JUSTICE MALLETT, by reaſon of his age, was diſcharged from his office on Tueſday 16th June 1663.

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*[124] * THE ARGUMENT OF MR. JUSTICE HYDE, IN THE CASE OF

Caſe 1. Manby *againſt* Scott.

Trinity Term, 1659. *Roll* 1460.

In the Exchequer Chamber.

If a wife *elope*, and, on her huſband refuſing to be reconciled, ſhe lives apart from him; and during this ſeparation, a tradeſman furniſh her with goods contrary to the *expreſs prohibition* of the huſband, the huſband is not liable to pay for them, although they are found to be *neceſſary* for his wife, and ſhe has no *ſeparate maintenance*.—S. C. 1. Keb. 69. 80. 206. 337. 361. 383. 429. 441. 482. S. C. 1. Sid. 109. to 130. S. C. 1. Lev. 4. S. C. 1. Bac. Abr. 296.

HYDE, *Juſtice*. A FEME COVERT departs from her huſband againſt his will, and continues abſent from him divers years: afterwards the wife deſires to cohabit with her huſband again, but the huſband refuſes to admit her; and from

that

that time the wife lives ſeparate from him. During this ſeparation, the huſband forbids a tradeſman of *London* to truſt his wife with any goods or wares; yet for divers years before and afterwards, allows his wife no maintenance. The tradeſman, contrary to the prohibition of the huſband, ſells and delivers divers wares to the wife upon credit, at a reaſonable price; and the wares ſo ſold and delivered to the wife are *neceſſary* for her, and ſuitable to the degree of her huſband. The wares are not paid for; wherefore the tradeſman brings an action upon the caſe againſt the huſband; and declares, that the huſband was indebted to him in forty pounds for divers wares and merchandizes formerly to the huſband ſold and delivered; and that the huſband, in conſideration thereof, did promiſe to pay him the ſaid forty pounds; that the huſband hath not paid the ſame to him, although thereunto required; and for that money the action is brought againſt the huſband. And, Whether this action will lie againſt the huſband for the wares thus ſold and delivered to the wife, againſt the will, and contrary to the prohibition of the huſband, or not? is the queſtion.

1. Vent. 24. 42. 2. Vent. 155. Allen, 61. Noy, 79. 126. Latch. 126. March. 60. 82. Styles, 18. Yelv. 166. Palm. 343. 1. Roll. Abr. 6. 1. Leon. 312. Cro. Car. 254. 355. 404. Cro. Jac. 661. 2. Show. 283. 6. Mod. 239. 9. Mod. 31. 42. 104. 10. Mod. 6. 33. 70. 163. 205. 245. 11. Mod. 241. 12. Mod. 244. 372. 603.

THIS CASE is the meaneſt that ever received reſolution in this place; but as the ſame is now handled, it is of as great conſequence to all the king's people of this realm, as any caſe can be. It concerns every individual perſon of both ſexes that is, or hereafter ſhall * be, married within this kingdom, in the firſt and neareſt relation, that is, betwixt *man* and *wife*. The holy ſtate of matrimony was ordained by Almighty God in Paradiſe, before the Fall of Man, ſignifying to us, that myſtical union which is between Chriſt and his Church; and ſo it is the firſt relation: and when two perſons are joined in that holy ſtate, they twain become one fleſh; and ſo it is the neareſt relation. This caſe toucheth the man, in point of his power and dominion over his wife; and it concerns the woman, in point of her ſubſtance and livelihood. I will deliver my opinion plainly and freely, according as I conceive the law to be, without favouring the one, or courting the other ſex. I hold, that judgment ought to be given for the defendant. The caſe hath been ſo fully argued, and all the authorities ſo particularly vouched by my brothers, who have already delivered their opinions, that nothing is left for me to ſay, which hath not been ſpoken by them in better terms than I can expreſs myſelf. It will be a trouble to your lordſhips for me to repeat their arguments, and yet without doing ſo, it will be impoſſible for me to ſpeak any thing to the purpoſe. It ſhall be my endeavour, therefore, rather to anſwer the reaſons and objections given and made by my two brothers, who have ſo copiouſly argued for the woman's power, than to argue the caſe on the ſame grounds which have been already delivered *(a)*. It is agreed by all my brothers who have argued, as I conceive, that a *feme covert* generally cannot bind or charge her huſband by any contract made by her without the authority or aſſent of her huſband precedent

* [125]

Gilb. Eq. Rep. 1. 145. 149. Prec. in Chan. 502. Abr. Eq. 61. 1. Ld. Ray. 444. 2. Ld. Ray. 1006. 1. Strange, 127. 647. 706. 2. Strange, 875. 1122. 1214. 1. Peer. Wms. 482. 3. Peer. Wms. 269. 273. 339. 409. 412.

(*a*) See LORD CHIEF BARON HALE's argument at length, 1. Bac. Abr. 296.

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or ſubſequent, either expreſs or implied. But the queſtion in this caſe is, If the contract of a *feme covert* for wares for her neceſſary apparel, made without the conſent, and contrary to *the prohibition* of her huſband, ſhall bind her huſband?

FIRST, I hold, that the huſband ſhall not be charged by ſuch a contract, although he do not allow any maintenance to his wife.

SECONDLY, Admit the huſband were chargeable generally by ſuch a contract; yet I conceive that this action doth not lie for the plaintiff, as this declaration is, and as this verdict is found againſt the defendant in this particular caſe.

*[126] * FOR THE FIRST, Every gift, contract, or bargain, is, or contains an agreement; for the contractor or bargainor wills, that the donee or bargainee ſhall have the things contracted for, and the other is content to take them; and ſo in every contract there is a mutual *aſſent* of their minds, which mutual aſſent is an agreement, as in *Fogaſſa's Caſe (a)*; and afterwards in the ſame caſe *(b)* it is ſaid, that AGREEMENT is a word compounded of two words, *viz. aggregatio* and *mentium*; ſo that *aggreamentum* is *aggregatio mentium*; or thus *aggreamentum* is no other but a union or conjunction of two minds in any matter or thing done, or to be done; according to that definition of SIR EDWARD COKE *(c)*, *contractus eſt quaſi actus contra actum:* but a *feme covert* cannot give a mutual aſſent of her mind, nor do any act without her huſband; for her will and mind, as alſo herſelf, is under, and ſubject to the will or mind of her huſband; and conſequently ſhe cannot make any bargain or contract, of herſelf, to bind her huſband. THE SECOND GROUND of the law of *England* is the law of God *(d)*. In the Beginning when God created woman an helpmate for man, he ſaid, "they twain ſhall be one fleſh;" and thereupon our law ſays, that huſband and wife are but one perſon in the law: preſently after the Fall, the judgment of God upon woman was, "Thy deſire ſhall be to thy huſband, for thy will "ſhall be ſubject to thy huſband, and he ſhall rule over thee *(e)*." Hereupon our law put the wife *ſub poteſtate viri*, and ſays, *quòd ipſa poteſtatem ſui non habeat, ſed vir ſuus*, and ſhe is diſabled to make any grant, contract, or bargain, without the allowance or conſent of her huſband *(f)*. The Books and authorities of our law which prove this point, have been all particularly vouched already, and I will not repeat them again, nor do I know any one particular point to the contrary. The words of the Book are obſervable, namely, "If a *feme covert* make a contract, or buy any "thing in the market, or elſewhere, without the allowance or con-

(a) Plowd. 17. Powel on Contracts, 7.
(b) Plowd. 17.
(c) Co. Lit. 47.
(d) Dr. & St. c. 6. fo. 10.
(e) Gen. ch. iii. ver. 16.
(f) Bract. bk. 3. c. 32. fo. 15. 1. Roll. 351. pl. 45.

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"ſent of her huſband, although it come to the uſe of the huſ- "band, yet the contract is void, and ſhall not charge the huſ- "band; but if a man command or licenſe his wife to buy things "neceſſary, or agree that ſhe ſhall buy, he ſhall be bound by this "command or licence *(a)*." Which proves, that it is not the buying or contract of the wife which binds or charges the huſband (for that is void in itſelf), but * the command or licenſe of the huſband which makes it the contract or bargain of the huſband. As to my BROTHER TWISDEN ſaying, that "all thoſe Books are "where the wife deals or trades as *a factor* to her huſband, and all "grounded upon that reaſon," the words themſelves prove the contrary; for the difference taken by all theſe Books is, between the buying and contract of the wife without the knowledge or conſent of her huſband, and a buying or contract had by the wife with allowance or command of the huſband. In the firſt caſe, the buying or contract is void; in the other, the allowance or command makes it good, as the contract or bargain of the huſband: beſides, weigh the inconveniencies which would follow if the law were otherwiſe. Judges, in their judgments, ought to have a great regard to the generality of the caſes of the king's ſubjects, and to the inconveniencies which may enſue thereon, by the one way or the other. Judges, in giving their reſolutions in caſes depending before them, are to judge of inconveniencies as things illegal; and an argument *ab inconvenienti* is very ſtrong to prove that it is againſt law *(b)*. Then examine the inconveniencies which muſt enſue, if the law were according to my brothers TWISDEN and TYRRELL'S opinions: if the contract or bargain of the wife made without the allowance or conſent of the huſband ſhall bind him upon pretence of neceſſary apparel, it will be in the power of the wife (who, by the law of God and of the land, is put under the power of the huſband, and is bound to live in ſubjection unto him) to rule over her huſband, and undo him, maugre his head, and it ſhall not be in the power of the huſband to prevent it. The wife ſhall be her own carver, and judge of the fitneſs of her apparel, of the time when it is neceſſary for her to have new cloaths, and as often as ſhe pleaſeth, without aſking the advice or allowance of her huſband: and is ſuch power ſuitable to the judgment of Almighty God inflicted upon woman for being firſt in the tranſgreſſion? "Thy deſire ſhall be to thy "huſband, and he ſhall rule over thee." Will wives depend on the kindneſs and favours of their huſbands, or be obſervant towards them as they ought to be, if ſuch a power be put into their hands?

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* [127]

See the caſe of Altenwood, 1. Co. 52.

1. Bac. Abr. 295.

* [128]

* SECONDLY, Admit that in truth the wife wants neceſſary apparel, woollen and linen, and thereupon ſhe goes into *Pater-noſter-*

Year-Book, 11. Hen. 6. pl. 30.

Brownl. 47. Allen, 61. Litt. Rep. 307. Hutt. 105. 1. Roll. Abr. 350. Salk. 116. 2 Ld. Ray. 1006. 6. Mod. 171. 2. Show. 283. Stra. 647. 706. 875. 1. Bac. Abr. 295.

(*a*) 21. Hen. 7. pl. 70. F. N. B. 120. Old. N. B. 62. 1. Roll. Abr. 351.
(*b*) Plowd. 279. 379.

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row, to a mercer, and takes up ſtuff, and makes a contract for neceſſary cloaths; thence goes into *Cheapſide*, and takes up linen there in like manner; and alſo goes into a third ſtreet, and fits herſelf with ribbands, and other neceſſaries ſuitable to her occaſions, and her huſband's degree. This done, ſhe goes away, diſpoſes of the commodities to furniſh herſelf with money to go abroad to *Hyde-park*, to ſcore at *gleeke*, or the like. Next morning this good woman goes abroad into ſome other part of *London*, makes her neceſſity and want of apparel known, and takes more wares upon truſt, as ſhe had done the day before; after the ſame manner ſhe goes to a third and fourth place, and makes new contracts for freſh wares, none of theſe tradeſmen knowing or imagining ſhe was formerly furniſhed by the other, and each of them ſeeing and believing her to have great need of the commodities ſold her; ſhall not the huſband be chargeable and liable to pay every one of theſe, if the contract of the wife doth bind him? Certainly, every one of theſe hath as juſt cauſe to ſue the huſband as the other, and he is as liable to the action of the laſt as the firſt or ſecond, if the wife's contract ſhall bind him; and where this will end no man can divine or foreſee. As for my BROTHER TYRRELL ſaying, "We may not alter the law becauſe an *incon-* "*venience* may follow thereon," that is true: but we ought to foreſee and provide againſt ſuch inconveniencies as may ariſe, before we adjudge or declare, in a particular caſe in queſtion, Whether the law be ſo or not? And that is the caſe here. It is objected, That the huſband is bound of common right to provide for and maintain his wife; and the law having diſabled the wife to bind herſelf by her contract, therefore the burthen ſhall reſt upon the huſband, who by law is bound to maintain her, and he ſhall do it *nolens volens*: generally the antecedent is moſt true; for ſhe is "bone of his bone, fleſh of his fleſh," and no man did ever hate his own fleſh ſo far as not to preſerve it. But apply this general propoſition to our particular caſe, and then ſee what logic there is in the argument. I am bound to maintain and provide for my wife: therefore my wife, de-
*[129] parting from me againſt my will, ſhall be her own * carver, and take up what apparel ſhe pleaſeth upon truſt, without my privity or allowance, and I ſhall be bound to pay for it: this is our caſe, for there is not a word throughout the whole verdict that the wife wanted neceſſary apparel; that ſhe ever acquainted her huſband with any ſuch matter; that ſhe ever deſired the huſband to ſupply her with money to buy it, or otherwiſe to provide for her; or that the huſband denied, refuſed, or neglected to do it. Beſides, although it be true, that the huſband is bound to maintain his wife, yet that is with this limitation, *viz.* ſo long as ſhe keeps the ſtation wherein the law hath placed her; ſo long as ſhe continues a help-meet to him; for if a woman of her own head, without the allowance or judgment of the Church, which hath united them in the holy ſtate of matrimony, and which only can ſeparate that, or diſſolve this union, depart

depart from her husband against his will, be the pretence what it will, she doth thereby put herself out of the husband's protection; so that during this unlawful separation, she is no part of her husband's care, charge, or family. The king is the head of the commonwealth: his office is, and he is bound of right, to protect and preserve his subjects in their persons, goods, and estates: and on that ground every loyal subject is said to be within the king's protection. But a man may put himself out of the king's protection by his offence; as by forsaking his allegiance to the king, and owning or setting up any foreign jurisdiction, and then every man may do to him as to the king's enemy, and he shall have no remedy or recovery by the king's laws or writs (*a*). The husband is the head of the wife as fully as the king is the head of the commonwealth; and the wife by the law is put *sub potestate viri* and under his protection, although he hath not *potestatem vitæ et necis* over her, as the king hath over his subjects. When the wife departs from her husband against his will, she forsakes and deserts his government; erects and sets up a new jurisdiction; and assumes to govern herself, *besides* at least, if not *against*, the law of God and the law of the land. Therefore it is but just, that the law for this offence should put her in the same plight in the petit commonwealth of the household, that it puts the subject for the like offence in the great commonwealth of the realm; and this according to * the civil law, NAMELY, * [130] "*Si uxor propria (sine culpâ mariti) sit extra consortium viri, non* "*tenetur maritus extunc ei extra consortium suum existenti aliqua-*" *liter subministrare; videtur enim virum alendi obligatione fore* "*exemptum, quoniam culpa sua extra viri consortium est.*" For, "NUPTIÆ *sunt conjunctio maris et fœminæ, et consortium ejus di-*" *vini et humani juris communicatio*" (*b*)." FLETA (*c*), speaking of Appeals, hath this expression: "*Fœmina de morte viri sui inter* "*brachia sua interfecti, et non aliter potuit appellare.*" BRACTON (*d*) is much to the same purpose; "*Non nisi in duobus ca-*" *sibus fœmina appellum habeat,* SCILICET, *non nisi de violentiâ* "*corpori suo illatâ, sicut de raptu et de morte viri sui interfecti* "*inter brachia sua*;" and the words of the writ of Appeal are suitable thereunto, SCILICET, "*venit idem* A. B. *et nequiter et* "*in felonia, &c. occidit ipsum virum suum inter brachia sua, &c.*" By the words "*inter brachia sua,*" in those ancient authors, is understood the wife, which the dead person lawfully had in possession at the time of his death; for she ought to be his wife of right, and also in possession (*e*). The words of the writ are observable; "*occidit virum suum inter brachia sua,*" and prove that the woman ought to be "*inter brachia viri sui,*" or otherwise she hath not the privilege of a wife. By an argument *à pari*, as the wife shall not have remedy against the murderer of her husband after his death, if he were not *inter brachia sua* at the time of his death, *pari ratione* she shall not have support or maintenance

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See the case of Mynes, Plowd. 315. and Fitz. Nat. Brev. 238

(*a*) The Year-Book 27. Edw. 3. pl. 1.
(*b*) DIGEST, *de Ritu Nuptiarum.*
(*c*) Bk. 1. c. 33.
(*d*) Bk. 3. ch. 24. f. 148.
(*e*) Com. 8. Mag. Charta, fo. 68.

from

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from her huſband in his life, when ſhe put herſelf *extra brachia ſua* againſt his will. But it is objected by my brother TYRRELL, that it appears not in whoſe default this departure was, Whether in his or her default? Thereto I anſwer, that the law doth not allow a wife to depart from her huſband in any caſe, or for any cauſe whatſoever of her own head. An expreſs command is laid upon her by the law of God to the contrary: "To the married "I command, yet not I, but the Lord, Let not the wife depart "from her huſband (*a*)." The proviſion which our law hath made for the ſafeguard of the perſon of a woman, in caſe of cruelty by her huſband, and for her maintenance in caſe the huſband refuſes to allow it, proves, That it is not lawful for the wife to depart from her huſband of her own head upon any pretence whatſoever (*b*). * If the wife be in fear or in doubt of her huſband that he will beat or kill her, ſhe ſhall have a *ſupplicavit* out of the chancery againſt her huſband, and cauſe him to find ſureties that he will not beat nor entreat her otherwiſe than in civil manner, and for to order and rule her, &c (*c*). The words of the writ are, "*Quòd ipſum* B. *coram te corporaliter venire facias, et* "*ipſum* B. *ad ſufficien. manucaption. inveniend. &c. quòd ipſe præ-* "*fat.* B. *bene et honeſtè tractabit gubernabit ac dampnum et ma-* "*lum aliquod eidem* A. *de corpore ſue elit. quam ad virum ſuum* "*ex cauſâ regiminis et caſtigationis uxoris ſuæ licitè et rationa-* "*bilit. pertinet, non faciet nec fieri procurabit.*" And if the huſband refuſe to give or allow neceſſary and fitting maintenance to his wife, the law hath provided a remedy for her by complaint to the ordinary in the eccleſiaſtical court (*d*). Next it is alledged by my brother TYRRELL, "that the wife in our caſe "did return, and deſired to cohabit with her huſband again, "which he refuſed, and ſo ſhe is remitted to her former condition." Admit that be true, yet her return hath not put her in a better condition than ſhe was in before her departure, in which caſe ſhe could not be her own carver, and have charged her huſband (according to her pleaſure) with apparel; but was to be clothed in ſuch ſort as her huſband thought fit. Beſides, in our caſe the wife departed from her huſband, and lived from him divers years after (before the wares ſold or the action brought); then ſhe deſired to cohabit with him, which he refuſed to admit; and from that time ſhe lived from him. This is all that appears in our caſe: and is this offence ſo eaſily purged with a bare deſire to cohabit, without any other ſubmiſſion and ſatisfaction given of the better carriage *in futuro?* The law of God ſays (*e*), "Wives, be in ſubjection to your huſbands as unto the Lord; "for the huſband is the head of the wife, as Chriſt is head of

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(*a*) Corinthians, ch. vii. ver. 10.
(*b*) 1. Sid. 129. 1. Salk. 118. Stra. 706. 875. 1214. 2. Vern. 493. 671. 2. Atk. 96. 3. Atk. 295. 547. 4. Burr. 2078. 2177.
(*c*) Fitz. N. B. 179.
(*d*) Litt. 78. 1. Ch. Rep. 44. 164. 2. Show. 282. 3. Atk. 547. 2. Atk. 96.
(*e*) St. Peter, ch. iii. ver. 4. Epheſ. ch. vth, ver. 22.

"the

" the Church." The Church declares, that one of the principal ends for which marriage was ordained, is for the mutual ſociety, help, and comfort, which the one ought to have of the other in proſperity and adverſity: it is alſo there ſaid, the woman of herſelf, in contracting of marriage, makes a ſolemn vow *in facie eccleſiæ* to live together with her huſband in the holy ſtate of matrimony, to obey him and ſerve him, to love him, and keep him in ſickneſs and in health, till death them do part. * The wife in our caſe, by departing from her huſband againſt his will, breaks all thoſe commands, and her own vow; ſhe makes a voluntary ſeparation and temporary divorce between herſelf and her huſband; ſhe deprives him of that mutual ſociety, help, and comfort, which ſhe owes to him, for divers years: and are all theſe offences waſhed away with a bare deſire, without ſubmiſſion or contrition? Certainly they are not; confeſſion and promiſe of future obedience ought to precede her remitter, or reſtitution to the privileges of a wife. The Prodigal Son in the Goſpel ſaid, " I will ariſe and go to my father, and ſay, I have ſinned," before the indulgent father did receive or clothe him; and this is according to the rule in the civil law; " *Si uxor quæ (culpa* " *ſua) receſſerat, pœnitentiâ ducta ad virum rediens nolit admitti* " *eam, extunc culpa purgatur, in virum transfundit. tenebiturque* " *ipſi ſeorſum habitanti alimenta præſtare.*" So that the wife ought to be a penitentiary before the huſband is bound to receive her, or give her any maintenance: and no ſuch thing appears or is found in the verdict in our caſe. It is ſaid by my brother TWISDEN, " although the wife depart from her huſband, yet " ſhe continues his wife, and ſhe ought not to ſtarve." If a woman be of ſo haughty a ſtomach that ſhe will chooſe to ſtarve rather than ſubmit, and be reconciled to her huſband, let her take her own choice: the law is in no default, which doth not provide for ſuch a wife. If a man be taken in execution and lie in priſon for debt, neither the plaintiff at whoſe ſuit he is arreſted, nor the ſheriff who took him, is bound to find him meat, drink, or clothes *(a)*; but he muſt live on his own, or on the charity of others: and if no man will relieve him, let him die in the name of God, ſays the law *(b)*; and ſo ſay I. If a woman, who can have no goods of her own to live on, will depart from her huſband againſt his will, and will not ſubmit herſelf to him, let her live on charity, or ſtarve in the name of God; for in ſuch caſe the law ſays, her evil demeanour has brought it upon herſelf, and her death ought to be imputed to her own wilfulneſs. As to my brother TYRRELL's objection, it were ſtrange if our law, which gives relief in all caſes, ſhould ſend a woman unto another law or court to ſeek remedy to have maintenance. I anſwer, It is not ſending the wife to another law, but leaving the caſe to its proper juriſdiction; the

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Co. Lit. 295.

(a) See the Lords Act.
(b) Dive and Manningham's Caſe, Plowd. 68.

caſe

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caſe being of eccleſiaſtical conuſance. Is it * any ſtrangeneſs or diſparagement to the common pleas, to ſend a cut-purſe or other felon taken in the court, to the king's bench to be indicted? or to the king's bench, to ſend a woman to the common-pleas to recover her dower? Why is it more ſtrange for the common-law to ſend a woman to the ordinary to determine differences betwixt her and her huſband touching matters of matrimony, than for our courts at common law to write to the ordinary to certify *marriage*, *baſtardy*, or the like, where iſſue is joined on theſe points in the king's courts? for although the proceeding and proceſs in the eccleſiaſtical courts are in the names of the biſhops, yet theſe courts are the king's courts, and the law by which they proceed is the king's law (*a*): But the reaſon in both caſes is, *quia hujuſmodi cauſæ cognitio ad forum ſpectat eccleſiaſticum* (*b*). According to that of *Bracton* (*c*), and *Staundford* (*d*), *ſunt caſus ſpirituales in quibus judex ſecularis non habet cognitionem neque executionem, quia non habet coercionem: In hiis enim caſibus ſpectat cognitio ad judices eccleſiaſticos qui regunt et defendunt ſacerdotium.*" And hereunto agrees *Cawdrie's Caſe* (*e*). As in temporal cauſes the king by the mouth of his judges in his courts of juſtice determines them by the temporal law, ſo in cauſes eccleſiaſtical and ſpiritual (the conuſance whereof belongs not to the common law) they are decided and determined by the eccleſiaſtical judges, according to the king's eccleſiaſtical laws; and that cauſes of matrimony, and the differences between huſband and wife touching *alimony*, or maintenance for the wife (which are dependant upon, or incident to matrimony) are all of eccleſiaſtical, and not of ſecular conuſance, is evident by the Books and authorities of our laws: "*De cauſâ teſtamentariâ ſicut* "*nec de cauſâ matrimoniali, curia regia ſe non intromittat, ſed in* "*foro eccleſiaſtico debet placitum terminari:*" All cauſes teſtamentary, and cauſes of matrimony, by the laws and cuſtoms of the realm, do belong to the ſpiritual juriſdiction. The words of the writ of prohibition granted in ſuch caſes are, "*Placita de ca-* "*tallis, et debitis quæ ſunt de teſtamento vel matrimonio, ſpectant* "*ad forum eccleſiaſticum.*" In a ſuit commenced by a woman againſt her huſband before the commiſſioners for eccleſiaſtical cauſes for alimony, a prohibition * was prayed and granted, becauſe it is a ſuit properly to be brought and proſecuted before the ordinary. In which if the party find himſelf grieved, he may have relief by appeal unto the ſuperior court; and that he cannot have upon a ſentence given in the high-commiſſion court. But it is objected by my brothers TYRRELL and TWISDEN, that the remedy in the eccleſiaſtical court is not ſufficient; for if the huſband will not obey the ſentence of the ordinary, it is but excommunication for his contumacy, and that will neither feed nor clothe the wife. Are the cenſures of the holy mother THE

Bracton, bk. 2. c. 20. fo. 7.

See the ſtatute 24. Hen. 8. c. 2.

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See Drake's Caſe, Cro. Car. 220.

(*a*) Cawdrie's Caſe, 5. Co. 39.
(*b*) Year-Book, 30. Hen. 6. Old Bk. Ent. 288.
(*c*) Bk. 3. fo. 107.
(*d*) Folio 57.
(*e*) 5. Co. 9.

CHURCH

CHURCH grown of ſo little account with us, or the ſeparation *à communione fidelium* become ſo contemptible, as to be ſlighted with but *excommunication?* Hath our law provided any remedy ſo penal, or can it give any judgment ſo fearful as this? With us the rule is, *Committitur Mareſcal.* or, *Priſon. de Fleet.* There the ſentence is, *Traditur Satanæ.* Which judgment is more penal? Take him *Gaoler*, till he pay THE DEBT: or, Take him *Devil*, till he obey THE CHURCH. And yet their judgment is warranted by the rule of ST. PAUL *(a)*, "Whom I have delivered unto Satan;" whereupon the Comment ſays, "*anathema ab ipſo Chriſti corpore (quod "eſt eccleſia) recidit (b).*" "*Trudam*;" and alſo, "*nullus cum "excommunicatis in oratione, aut cibo, aut potu, aut eſculo eommu-"nicet, nec ave eis dicat (c).*" As much is ſaid by our law, and it is to the ſame effect: "*Excommunicato interdicitur omnis actus "legitimus, ita quòd agere non poteſt, nec aliquem convenire cum "ipſo, nec orare, nec loqui, nec palam nec abſconditè veſci licet.*" THE SECOND GROUND of the law of excommunication is the law of England; and it is a ground in the law of *England*, that he who is accurſed ſhall not maintain any action *(d)*. Where a man is excommunicated by the law of the Church, if he ſue any action, real or perſonal, the tenant or defendant may plead, that he is excommunicated, and demand judgment, if he ſhall be anſwered *(e)*. The ſentence is ſet forth at large in the old ſtatute-book of MAGNA CHARTA, and is entitled, "*Sententia lata ſuper Chartas*," NAMELY, "*Authoritate Dei Patris Omnipotentis, et Filii, et Spiritûs Sancti excommunicamus, anathematizamus, et à liminibus Sanctæ Matris Eccleſiæ ſequeſtramus omnes illos, &c (f).*" * He who, by the renunciation, is rightfully cut off from the unity of the Church, and excommunicated, ought to be taken by the whole multitude as a heathen and a publican, until he be openly reconciled by penance *(g)*. And this is grounded on the rule of our Bleſſed Saviour, "*Dic Eccleſiæ*;" and, "If he neglect to hear the Church, let him be as an heathen and publican *(h)*." Shall a man be accurſed, barred of the company or ſociety of Chriſtians, cut off from the body of Chriſt, accounted as a heathen and publican, for not allowing maintenance to his wife, when the Church enjoins him ſo to do; and ſhall not this be accounted a ſufficient remedy for the wife? I fear it is the want of religion, and due credence to the cenſures of the Church, which occaſions this objection, rather than real want of ſufficient remedy in law for her relief.

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THE LAST MATTER to be anſwered, is rather the opinion of my brothers TWISDEN and TYRRELL in their arguments, than an objection in this caſe; namely, if an *action upon the caſe* doth not lie againſt the huſband upon the contract of the wife for neceſſary

(a) 1. Ep. Cor. ch. vth, ver. 5.
(b) Cauſa 3. queſt. 4. Cam. Egell.
(c) Cauſa 2. qu. 3. can. excom. BRACTON, bk. 5. c. 23. f. 42.
(d) Dr. & St. 11.
(e) Lit. 201.
(f) 12. Hen. 3. pl. 146.
(g) Acts, ch. 33. confirmed by the ſtatute 13. Eliz. c.
(h) St. Math. c. xviii. ver. 17.

apparel,

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apparel, yet an action of *trover and converſion* doth lie againſt him for the ſtuff; and ſo one way or other the huſband muſt pay the reckoning. If the law ſhould be ſo, it were a converſion with a witneſs; for then the huſband ſhould ſeem to be *ſub poteſtate fœminæ:* he might glory in the words of ST. PAUL, "I would "have you know, that the head of the woman is the man." But if the wife ſhall ſet his cap, or lay his headſhip in the gaol, it ſhall not be in the power of the huſband to prevent or avoid it. One kind of divorce between huſband and wife is, when action of treſpaſs is brought againſt them, and the huſband only appears, and proceſs iſſues out againſt the wife; until ſhe be waived and outlawed ſhe can never purchaſe her pardon, or reverſe the outlawry, unleſs the huſband will appear; ſo that if the huſband pleaſe he is divorced (*a*). If the wife be outlawed by erroneous proceſs, and the huſband will not bring a writ of error, he may by this way be rid of a ſhrew, and that doth countervail a divorce (*b*). By theſe Books it appears, that the law puts a power in the huſband to be rid of his wife, and provides a remedy to tame a ſhrew; but I never heard before, that the law hath left it in the power of the wife to do ſo by her huſband; and * I do not remember that my brothers did vouch any authority, or give any reaſon for maintenance of their opinions; and therefore I may with freedom deny the law to be as they have ſaid. Beſides, the nature of an action of *trover* proves that it lies not in this caſe. The count is, That the plaintiff was *poſſeſſed* of ſuch goods (and names them) as of his own proper goods, and caſually *loſt* them; that the goods came to the defendant's hands by *finding*, yet he, knowing them to belong to the plaintiff, refuſeth to deliver them to him, but hath *converted* them to his own uſe; ſo that an action is grounded upon *a wrong* ſuppoſed to be done by the defendant, in converting the goods of the plaintiff knowingly to his own uſe, againſt the will of the plaintiff: and that is the reaſon why the plaintiff in that action muſt prove a demand of the goods, and an actual converſion by the defendant, or elſe he fails in the action. In an action on the caſe, for that the defendant did find the goods of the plaintiff, and delivered them to perſons unknown, "*non deliberavit modo et for-*"*mâ*" is no plea, without ſaying "*not guilty*," where the thing reſts in feaſance. And if the action be, That the plaintiff was poſſeſſed *ut de bonis propriis*, and the defendant did find and convert them to his own uſe; it is no plea, that the plaintiff was not poſſeſſed *ut de bonis propriis*, but he muſt plead "*not guilty*" to the miſdemeanor, and give the other matter in evidence. In TROVER the plaintiff declares, that he was poſſeſſed of ſuch goods, and caſually loſt them, and the defendant found them, and converted them to his own uſe; the defendant pleaded that the plaintiff gaged the goods to him for ten pounds, and that he detained the goods for ten pounds: this is no plea; but he ought to plead "*not guilty*," and give this matter in evidence; for the action ſuppoſes *a wrong*,

Vide 1. Lev. 51. 1. Keb. 194. and 637.

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Co. Lit. 283. a. 2. Stra. 651.

(*a*) 14. Hen. 6. pl. 14. a.
(*b*) 18. Edw. 4. pl. 4. a. 12. Mod. 444.

which

which the defendant ought to anſwer. But what wrong is done to the plaintiff in our caſe, when he himſelf ſells and delivers the goods? It is not unlike the caſe where two men, by mutual conſent, wreſtle or play at foot-ball together; will *an action* of aſſault and battery lie for the one againſt the other, when the act is done by their mutual agreement beforehand? Put the caſe of a ſale made to a man upon credit, where the vendee promiſes to pay for the goods at *Michaelmas*, but fails to pay the money accordingly, ſhall the ſaleſman have trover againſt the vendee, becauſe he pays not the money at the day? And will the ſale to this *feme covert* alter the caſe, or the law, as to the action? It is true, that for a converſion by the woman before coverture, or by the wife during the coverture, an action of trover lies againſt the huſband and wife; but this is for a converſion by wrong, when ſhe takes the goods, and converts them againſt the will of the owner *(a)*. As in caſe where a man comes to buy goods, and offers ten pounds for them, and the owner agrees to accept the money, whereupon the buyer takes the goods away without payment or delivery by the owner; there an action of treſpaſs or trover lies, notwithſtanding the bargain: otherwiſe it is, if they agree upon a price, and the vendor take the vendee's word for payment, and deliver the goods to him; there the vendor is put to his action for the money upon the contract, and ſhall not bring trover for the goods. If *an infant* give or ſell goods, and deliver them with his own hand, he ſhall have no action of treſpaſs againſt the donee or vendee, by reaſon of the delivery *(b)*: but if an infant give or ſell goods, and the vendee or donee take them by force of the gift or ſale, the infant may have an action of treſpaſs againſt him. So in our caſe: if a *feme covert* take wares of a ſhop-keeper, againſt his will, upon pretence of buying them, an action lies againſt the huſband; but if the owner ſell the goods to the wife upon truſt, and deliver the goods to her, he ſhall not have an action of treſpaſs againſt the huſband by reaſon of this delivery. If a man take my wife and clothe her, this amounts to a gift of the apparel to her; and I may take my wife with the apparel, and no action lies againſt me: by the ſame reaſon when a man delivers ſtuff, or other wares to my wife, knowing her to be a *feme covert*, to make apparel, without my privity or allowance, this ſhall be conſtrued to be a gift of the ſtuff to her, and I ſhall not be charged in any action for it: beſides, conſider the inconveniencies which will follow, if an action of trover ſhould be againſt the huſband; for then the huſband ſhall be barred of all thoſe helps which my brothers (who maintain that opinion) have allowed to him, and have made reaſons for which an action of the

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21. Hen. 7. pl. 6.

14. Hen. 8. pl. 22.

Cro. Car. 344. Finch, 22. 11. Hen. 4. pl. 83.

(a) Remis and Humfrey's Caſe, 3. Keb. 295. Latch. 10. 3. Mod. 310. Ante, 25. Perkins, 22. 19. 3. Bac. Abr. 139, 140. 3. Burr. 1794.

(b) 21. Hen. 7. pl. 30. 26. Hen. 8. pl. 2. Hob. 77. 2. Roll. Rep. 408.

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caſe ſhould lie *againſt him on the contract; namely, the jurors are to examine and ſet the price or value, and the neceſſity and fitneſs of things, with relation to the degree of the huſband, whereby care is taken, that the huſband have no wrong; for in an action of trover the jury cannot examine any of thoſe matters, but are to enquire only of *the property* of the *plaintiff*, and *the converſion* by the *defendant*, and to give damages according to *the value* of the goods: and ſo it ſhall be in the power of the wife to take up what ſhe pleaſeth, and to have what ſhe liſts, without reference to the degree, or reſpect to the eſtate of her huſband, and he ſhall be charged with it *nolens volens*. It is objected, that the jury is to judge what is fit for the wife's degree, that they are truſted with the reaſonableneſs of the price, and are to examine the value; and alſo the neceſſity of the things or apparel. Alas,

1. Salk. 118.

poor man! what a judicature is ſet up here to decide the private difference between huſband and wife? The wife will have a velvet gown, and a ſattin petticoat, and the huſband thinks mohair, or farendon for a gown, and watered tabby for a petticoat is as faſhionable, and fitter for his quality. The huſband ſays, that a plain lawn gorget of ten ſhillings pleaſeth him, and ſuits beſt with his condition; the wife will have a Flanders lace, or point handkerchief of forty pounds, and takes it up at THE EXCHANGE. A jury of mercers, ſilkmen, ſempſters, and exchange-men, are very excellent and very indifferent judges to decide this controverſy: it is not for their avail and ſupport to be againſt the wife, that they may put off their braided wares to the wife upon truſt, at their own price, and then ſue the huſband for the money. Are not a jury of drapers and milliners bound to favour the mercer or exchange-men to-day, that they may do the like for them to-morrow? And beſides, What matter of fact (and of that only the law hath made jurors the judges) is there in the fitneſs of the commodities with reference to the degree of the huſband? and, Whether this or that thing be the moſt neceſſary for the wife? The matter of fact is, to find, that the wife wanted neceſſary apparel, and that ſhe bought ſuch and ſuch wares of the plaintiff, at ſuch a price, to clothe herſelf; and leaves the fitneſs of the one, and the reaſonableneſs of the other, to the Court; for that is matter of law, whereof the jurors have no conuſance. Leſſee for life of a houſe

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puts his *goods therein, makes his executors, and dies; whoſoever hath the houſe after his death, yet his executors ſhall have free entry, egreſs and regreſs to carry their teſtator's goods out of the houſe by reaſonable time (*a*). And this reaſonable time ſhall be adjudged by the diſcretion of the Juſtices before whom the cauſe depends, upon the true ſtate of the matter, and not by the jury (*b*). So it is in caſe of fines for admittance, cuſtoms, and ſervices, if the queſtion be, Whether the ſame be reaſonable, or

(*a*) Litt. 69. 11. Co. 44.
(*b*) Go. Lit. 56. b. See alſo ante, page 27. caſe 73. note (*a*).

not?

not? For reaſonableneſs belongs to the knowledge of the law. A leſſee for life makes a leaſe for years; and dies within the term; in an action of treſpaſs, brought by the firſt leſſor againſt the leſſee for years, he ought by his plea to ſet forth what day his leſſor died, and at what place, where the land lies, and at what day he did leave the poſſeſſion; and ſo leave it to the diſcretion of the Court, Whether he did quit the poſſeſſion in reaſonable time, or not? The fitneſs or neceſſity of apparel, and the reaſonableneſs of the price, ſhall be judged by the Court, upon the circumſtance of the matter, as the ſame appears by the pleadings, or is found by the jury; but the jurors are not judges thereof. Again, there is a twofold neceſſity, *neceſſitas ſimplex*, *vel abſoluta*, and *neceſſitas qualificata*, *vel convenientiæ*. Of a ſimple and abſolute neceſſity, in the caſe of apparel or food for a *feme covert*, the law of the land takes notice, and provides remedy for the wife, if the huſband refuſe or neglect to do it. But if it be only *neceſſitas convenientiæ*, whether this or that apparel, this or that meat or drink, be moſt neceſſary or convenient for any wife, the law makes no perſon judge thereof but the huſband himſelf; and in thoſe caſes no man is to put his hand between the bone and the fleſh. I will conclude the general queſtion, or firſt point, with the judgment of *Sir Thomas Smith*, in his book of the Commonwealth of *England*: "The naturaleſt and firſt conjunction of two towards the making "a further ſociety of continuance, is of the huſband and wife, "each having care of the family: the man to get, to travel abroad, "to defend; the wife to ſave, to ſtay at home, and diſtribute that "which is gotten for the nurture of the children and family; is "the firſt and moſt natural but primate apparence of one of the "beſt kind of commonwealths, where not one always, but ſome-"time, and in ſome things, another bears * rule; which to main-"tain, God hath given the man greater wit, better ſtrength, bet-"ter courage to compel the woman to obey, by reaſon or force; "and to the woman, beauty, fair countenance, and ſweet words "to make the man obey her again for love. Thus each obeyeth "and commandeth the other, and they two together rule the houſe, "ſo long as they remain together in one." I wiſh, with all my heart, that the women of this age would learn thus to obey, and thus to command their huſbands: ſo will they want for nothing that is fit, and theſe kind of fleſh-flies ſhall not ſuck up or devour their huſbands eſtates by illegal tricks.

MANBY *againſt* SCOTT.

Hubart's Caſe, 4. Co. 27.

Soinor's Caſe, in the Year-Book, 22. Edw. 4. pl. 18.

Book 1. cap. 11. fol. 23.

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I am come now to this particular caſe, as it ſtands before us on this record. Admit that the huſband were chargeable by law by the contract of his wife, yet judgment ought to be given againſt the plaintiff, upon this declaration, as this verdict is found. FIRST, The declaration is, that the defendant was indebted to the plaintiff in ninety pounds, for wares and merchandizes by the plaintiff to him before that time ſold and delivered; and the verdict finds, that the wares were not ſold and delivered to the defendant, but the

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Darcy v. Denier, Yelv. 106.

ſame were ſold to his wife without his privity or conſent. So it appears, that the plaintiff hath miſtaken his action upon the caſe for wares ſold to him, and ought to have declared ſpecially, according to the truth of his caſe, for wares ſold to his wife for neceſſary apparel. In an action of battery againſt the huſband and wife, the plaintiff counted, that they both did aſſault and beat him. Upon not guilty pleaded, the jury found, that the wife alone did make the aſſault, and not the huſband: and the verdict was againſt the plaintiff, becauſe now the plaintiff's action appeared to be falſe; for the huſband ought not to be joined, but for conformity; and there is a ſpecial action for the plaintiff in that caſe: ſo this verdict is againſt the caſe, becauſe it appears, that the action brought by him is falſe, and that he ought to have brought another action upon the ſpecial matter of his caſe, if any ſuch law lie for him. SECONDLY, The jury find, that the defendant's wife departed from him againſt his will, and lived from him; and that the defendant, before the wares were ſold to his wife, did forbid the plaintiff to truſt his wife with any wares; and that the plaintiff, contrary to his prohibition, did ſell

* [141] * and deliver thoſe wares to the wife upon credit: and I conceive, that this prohibition doth ſo far bar or bind the plaintiff, that he ſhall never have any action againſt the defendant for wares ſold and delivered to his wife, after he was prohibited by the huſband. It is agreed by all, that a *feme covert* cannot generally make any contract which ſhall charge or diſcharge her huſband, without the authority or conſent of the huſband, precedent or ſubſequent; ſo that the authority or conſent of the huſband is the foundation or ground which makes the contract good againſt him: but when the huſband forbids a particular perſon to truſt his wife, this prohibition is an abſolute revocation or countermand, as to the perſon, of the general authority which the wife had before, and puts him in the ſame plight as if the wife had never any authority given her. It is ſaid by my brothers TWISDEN and TYRRELL, that the prohibition of the huſband is void; for (ſays TYRRELL) the huſband is bound to maintain his wife, notwithſtanding her departure from him, and therefore he cannot prohibit others to do it.—And TWISDEN ſays, It is a right veſted in her by the law, and therefore the prohibition of the huſband ſhall not diveſt, or take it away from her.—I have already anſwered and diſproved theſe reaſons, on which they ground their opinions, and will not repeat them here again; but admit that the huſband were by law bound to maintain his wife, notwithſtanding her departure from him againſt his will; and that the law doth give her, or veſt a right in the wife to bind or charge the huſband by her contract for neceſſary apparel; will this be a good conſequence thereupon, Therefore the huſband cannot forbid this or that particular perſon to truſt his wife? A man makes a feoffment in fee, upon condition that the feoffee ſhall not alien; this condition is void. Were it not a ſtrange concluſion to ſay thereupon, If a man make a feoff-

Litt. ſect. 360.

ment

ment in fee, upon condition that the feoffee ſhall not alien to *J. S.* that this condition is likewiſe void? The reaſon given by *Littleton*, why the condition is void in the former, and not in the latter part of this ſecond * caſe, is applicable to our caſe; namely, The condition in the firſt caſe ouſts the feoffee of all the power which the law gives to him, which ſhould be againſt reaſon, and therefore the ſame is void; but in the latter caſe the condition doth not take away all the power of aliening from the feoffee, and therefore it is good: So in our caſe, if the prohibition were ſo general, that the wife were thereby diſabled altogether to clothe herſelf, peradventure it might be reaſonable to ſay, that the prohibition was void; but it being a reſtriction only to one particular perſon, there is no colour to ſay, that it is not good. It is true, as my BROTHER TYRRELL ſays, that I cannot diſcharge others to deal with my wife, although I may forbid my wife to deal with them; but it follows not thereupon, but that my prohibition to a particular perſon doth make his dealing with, or truſting my wife, to be at his own peril, ſo that he ſhall not charge me thereby in an action; as in caſe of a ſervant, who buys proviſion for my houſehold by my allowance: if I forbid a butcher, or other victualler, to ſell to my ſervant without ready money, and he deliver meat to my ſervant afterwards upon truſt, it is at his peril; he ſhall have no action againſt me for it. It appears not by this declaration or verdict, that the defendant's wife did want apparel, that ſhe ever deſired her huſband to ſupply her therewith, that he refuſed to allow her what was fit, that the wares ſold to her by the plaintiff were for neceſſary apparel, or of what nature or price the wares were; ſo that the Court may judge of the neceſſity or fitneſs thereof: but only, that the plaintiff did ſell and deliver upon credit divers of the wares mentioned in the declaration unto the wife (whereas none are mentioned therein) for forty-three pounds; that this was a reaſonable price for theſe wares, and the ſame wares were neceſſary for her, and ſuitable to the degree of her huſband; and for theſe reaſons the defendant ought to have judgment in this particular caſe againſt the plaintiff, be the law what it will in general. I will conclude all, as the ſeven princes of Perſia (who knew law and judgment) did, in the caſe of *Queen Vaſthi*, "This deed that this woman * hath done in departing "from her huſband againſt his will, and taking of clothes upon "truſt, contrary to his prohibition, ſhall come abroad to all wo- "men; and if it ſhall be repeated that her huſband (by the opi- "nion of the Judges) muſt pay for the wares which ſhe ſo took "up whilſt ſhe lived from him, then ſhall their huſbands be deſ- "piſed in their eyes. But when it ſhall be known throughout "the realm, That the law doth not charge the huſband in this "caſe, all the wives ſhall give to their huſbands honour, both "great and ſmall."

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1. Salk. 118.

Eſther, cap. i. verſe 16, &c.

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Judgment for the defendant, TYRRELL, TWISDEN and MALLETT diſſenting *(a)*.

(a) But although a *feme covert* is by the *general rule* of law incapable, during the coverture, of binding either herſelf or her huſband, *by her aſſent*, to any agreement, 1. Sid. 120. 4. Leon. 42. 1. Salk. 118. yet there are ſeveral *exceptions* under which ſhe may both in law and equity make ſuch contracts as will be binding on herſelf, and entitle her to ſue, or ſubject her to be ſued, as if ſhe were a *feme ſole*. FIRST, Where a wife has a ſeparate property ſettled upon her previous to the marriage. Grigby *v.* Cox, 1. Vezey, 517.; Allen *v.* Papworth, 1. Vezey, 163.; Bell *v.* Hyde, Prec. Chan. 328. Gilb. Eq. Rep. 83.; Peacock *v.* Monk, 2. Vezey, 193.; Norton *v.* Turvil. 2. Peer. Wms. 144.; Stanford *v.* Marſhal, 2. Atk. 68.; Freeman *v.* Maſon, 2. Brown's Caſ. Par. 378.; Wright *v.* Cadogan, 6. Brown's Caſ. Par. 156.; Moſeley's Caſe, 2. Vern. 225; Carter *v.* Strahan, Cowp. 201. Dougl. 53. SECONDLY, If her huſband has abjured the realm, or is baniſhed. The Year-Book 1. Hen. 4. pl. 1. 10. Edw. 3. pl. 37. Jenk. Cent. 4. Moor, 851. Co. Lit. 133. 332. 1. Roll. Rep. 400. 2. Vern. 104. 1. Salk. 116. 1. Ld. Ray. 147. 1. Bac. Abr. 308. Cooke's Bank. Laws, 26. THIRDLY, By the cuſtom of London, as where a *feme covert* trades by herſelf in a trade with which her huſband does not intermeddle. 10. Mod. 6. FOURTHLY, Where a wife lives ſeparate from her huſband, on a *ſeparate maintenance* allowed her by her huſband on ſeparation after the marriage. Lean *v.* Schutz, 2. Bl. Rep. 1195.; Ringſtead *v.* Lady Lanesborough, Cooke's Bank. Laws, 24. Powel on Contracts, 78. 3 Barwell and Brooks, Co. Ban. Laws, 28.; Corbet *v.* Polnitz, 1. Term Rep. 5. But ſee as to the doctrines of this laſt caſe, Powell on Contracts, 89. to 114. It is clear alſo, that a wife may, from an implied aſſent, bind her huſband by her contracts for neceſſaries during cohabitation, 1. Sid. 120. provided the contract be not made under illegal circumſtances, Fowler *v.* Dingley, 2. Stra. 1122. and no expreſs prohibition be given to venders of the goods, Salk. 118.; but a wife can in no caſe render her huſband liable for *money* borrowed, although it is actually employed in the purchaſe of neceſſaries. 1. Peer. Wms. 183. See alſo 3. Wilſ. 388. Bull. N. P. 136. Salk. 119. Stra. 647. 706. 2. Stra. 875. 1214. 2. Bl. Rep. 1079. 2. Brown's Rep. Chan. 377. 1. H. Bl. Rep. 334. 348.

TRINITY

TRINITY TERM,

The Twenty-Ninth of Charles the Second,

IN

The King's Bench.

Friday, 15. *June*, 1677.

Sir Richard Rainsford, *Knt. Chief Juſtice*,

Sir Thomas Twiſden, *Knt.*
Sir William Wylde, *Knt.*
Sir Thomas Jones, *Knt.*
} *Juſtices.*

Sir William Jones, *Knt. Attorney General.*

Sir Francis Winnington, *Knt. Solicitor General.*

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* The Earl of Shaftſbury's Caſe.

Caſe 1.

HE was brought to the bar upon the return of an *habeas corpus*, directed to the conſtable of the TOWER of LONDON. The effect of the return was, That ANTHONY EARL OF SHAFTSBURY, in the writ mentioned, was committed

The court of king's bench will not, during the continuance of the ſeſſion, bail a peer, or other perſon, committed by the houſe of lords "for a high contempt againſt the houſe," although the warrant do not expreſs *the nature* of the contempt, nor *the place* where it was committed, nor *the time* when it was committed, nor whether it was on a *conviction* or *accuſation* only; for this power of commitment is out of the privileges of the houſe, and therefore the Court hath no juriſdiction; but a perſon committed for a contempt by the order of either houſe of parliament *may* be diſcharged by the court of king's bench after a *diſſolution* or *prorogation* of the parliament, whether he were committed during the ſeſſion or afterwards; for all orders of parliament are determined by a diſſolution or prorogation.—S. C. 1. Freem. 453., S. C. 3. Keb. 792. S. C. 2. State Tr. 612. 2. Show. 336. 12. Mod. 441. 564. 606. Fitzg. 111. 266. 1. Ld. Ray. 603. 2. Ld. Ray. 789. 1105. 3. Peer. Wms. 154. 2. Ld. Ray. 1105. 2. Bl. Rep. 757. 2. Hawkins' Pleas of the Crown, 6th edit. p. 170. *in pleis.*

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to the TOWER of *London*, 16. *February* 1676, by virtue of an order of the lords ſpiritual and temporal in parliament aſſembled. The tenor of which order followeth in theſe words: "Ordered "by the lords ſpiritual and temporal in Parliament aſſembled, that "the conſtable of his majeſty's TOWER of *London*, his deputy "or deputies, ſhall receive the bodies of *James Earl of Saliſ-* "*bury*, *Anthony Earl of Shaftſbury*, and *Philip Lord Wharton*, "members of this houſe, and keep them in ſafe cuſtody, within "the ſaid TOWER, during his majeſty's pleaſure, and the pleaſure "of this houſe, for their high contempt committed againſt this "houſe: and this ſhall be a ſufficient warrant on that behalf."

To THE CONSTABLE, *&c.* JOHN BROWNE, *Cler' Parl'*.

The Earl of Shaftſbury's counſel prayed, that the return might be filed, and it was ſo; and the *Friday* following was appointed for the debating of the ſufficiency of the return. In the mean time, directions were given to his counſel, to attend the Judges and the attorney-general, with their exceptions to the return; and my lord was remanded till that day: and it was ſaid, that though the return was filed, the Court could remand or commit him to the marſhal at their election.

On *Friday* the earl was brought into court again, and his counſel argued the inſufficiency of the return.

WILLIAMS ſaid, that this cauſe was of great conſequence, in regard that the king was touched in his prerogative, the * ſubject in his liberty, and this court in its juriſdiction.—FIRST, The cauſe of his commitment (which is returned) is not ſufficient; for the general allegation, of "high contempts," is too uncertain; for the Court cannot judge of the contempt, if it doth not appear in what act it is. SECONDLY, It is not ſhewed where the contempt was committed; and, in favour of liberty, it ſhall be intended it was committed out of the houſe of peers. THIRDLY, The time is uncertain; ſo that, peradventure, it was before the laſt act of general pardon (*a*). FOURTHLY, It doth not appear whether this commitment was on a *conviction*, or an *accuſation* only. It cannot be denied, but that the return of ſuch commitment by any other court, would be too general and uncertain. In *Moore*, 839. it appears, that *Aſtwick* was bailed on a return, "*quòd com-* "*miſſus fuit per mandatum* NI. BACON, *mil. domini cuſtodis magni* "*ſigilli* Angliæ, *virtute cujuſdam contempt. in curiâ cancellariæ* "*fact.*;" and in that book it appears, that divers other perſons were bailed on ſuch general returns; and the caſes have been lately affirmed in *Buſhell's Caſe*, reported by VAUGHAN, *Chief Juſtice*, where it is expreſsly ſaid, that on ſuch commitment and return, being too general and uncertain, the Court cannot believe in an implicit manner, that in truth the commitment was for cauſes particular and ſufficient (*b*). The commitment of the jurors was for

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(*a*) See Ruſſel's Caſe, 1. Roll. Abr. 193, 193. pl. 19.

(*b*) Vide ante, 119. Poſt. 147. 184, 185. Vaugh. 14. 2. Inſt. 52, 53. 55. 1. Roll. 218.

acquitting

acquitting *Pen* and *Mead*, "*contra plenam et manifeſtam eviden-*
"*tiam*;" and it was reſolved to be too general, for the evidence ought to appear as certain to the Judge of the return, as it appeared before the Judge authorized to commit (*a*). This commitment being by the houſe of peers will make no difference; for in all caſes where a matter comes in judgment before this court, let the queſtion be of what nature it will, the Court is obliged to declare the law, and that without diſtinction, whether the queſtion began in parliament or no. In the caſe of *Sir —— Binion* (*b*) in the common pleas, there was a long debate, Whether *an original* might be filed againſt a member of parliament during the time of privilege? And it was urged, that it being during the ſeſſions of parliament, the determination of the queſtion did belong to the parliament; but it was reſolved, *an original* might be filed (*c*); and BRIDGMAN, * then being Chief Juſtice, ſaid, that the Court was obliged to declare the law, in all caſes that come in judgment before them. In *Hilary Term*, 24. *Edw.* 4. *Roll.* 4. 7. and 10. in the *Exchequer*, in debt by *Rivers v. Couſin*, the defendant pleads, that he was a ſervant to a member of parliament, and *ideo capi ſeu arreſt. non debet*; and the plaintiff prays judgment; and *quia videtur baronibus quòd tale habetur privilegium quòd magnates, &c. et eorum familiares capi ſeu arreſtari non debent; ſed nullum habetur privilegium quòd non debent implacitari: Ideo reſpondeat ouſter* (*d*). So in *Treymiard's Caſe* (*e*), a queſtion of privilege was determined in this court. In the 14. *Edw.* 3. in the caſe of *Sir John* and *Sir Geoffry Staunton* (which was cited in the caſe of the *Earl of Clarendon*, and is entered in the lords journals), an action of waſte depended between them in the common pleas, and the Court was divided, and the record was certified into the houſe of parliament; and they gave direction that the judgment ſhould be entered for the plaintiff; but afterwards, in a writ of error brought in this court, that judgment was reverſed, notwithſtanding the objection that it was given by order of the houſe of lords; for the court was obliged to proceed, according to the law, in a matter which was before them in point of judgment. The conſtruction of all acts of parliament is given to the courts at *Weſtminſter*; and accordingly they have adjudged of

2. Show. 337.

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Stiles, 139. 2. Show. 84. March. 92. Lateh. 150. 2. Stra. 1065.

(*a*) Ruſſell's Caſe, 1. Roll. Abr. 192. 219.

(*b*) 1. Lev. 111. 1. Show. 99. 1. Pryn. Parl. Writs, 814, 815. 2. Salk. 512. Carth. 137. 3. Ld. Ray. 1113.

(*c*) And now by 12. & 13. Will. 3. c. 13. "Any member of the houſe of "commons, or other perſon having pri-"vilege of parliament, may alſo be ſued "by original bill and ſummons, attach-"ment, and diſtreſs infinite." 2. Ld. Ray. 1442. Cowp. 844. Tidd's Pract. 3, 81. See alſo 11. Geo. 2. c. 24. 14. Geo. 3. c. 33. and 10. Geo. 3. c. 50. 2. Stra. 985. Fort. 159. Comyns Rep. 444. 1. Black. Com. 165.

(*d*) But ſee an order of the houſe of peers, 24. May 1724, that this privilege is reſtrained to *menial ſervants* and others neceſſarily employed about the eſtates of peers; and by another order, of 22. Jan. 1715, every peer ſhall, upon his honour, certify to the houſe, that the perſons protected are within the privilege of the houſe. See 2. Stra. 1065. 1. Wilſ. 278. and the ſtatute 10. Geo. 3. c. 50. by which this privilege ſeems to be taken away.

(*e*) Dyer, 60.

the

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the validity of acts of parliament; have searched the rolls of parliament (*a*); have determined whether the journals be a record (*b*); and, when a point comes before them in judgment, they are not foreclosed by any act of the lords (*c*). If it appear, that an act of parliament was made by the king and lords without the commons, that is *felo de se*, and the courts of *Weſtminſter* do adjudge it void (*d*); and accordingly they ought to do. If this return contain in it that which is fatal to itſelf, it muſt ſtand or fall thereby. It hath been a queſtion often reſolved in this court, When a writ of error in parliament ſhall be a *ſuperſedeas*? And this Court hath determined what ſhall be ſaid to be a ſeſſion of parliament (*e*); and if the law were otherwiſe, there would be a failure of juſtice. If the parliament were diſſolved, there can be no queſtion, but the priſoner ſhould be diſcharged on *a habeas corpus*; and yet then the Court muſt examine the cauſe of his commitment; and by conſequence therefrom muſt examine a * matter parliamentary: and the Court may now have cognizance of the matter as clearly as when the parliament is diſſolved. The party would be without remedy for his liberty, if he could not find it here; for it is not ſufficient for him to procure the lords to determine their pleaſure for his impriſonment; for before his enlargement, he muſt obtain the pleaſure of the king to be determined, and that ought to be in this court, and therefore the priſoner ought firſt to reſort hither. Let us ſuppoſe (for it doth not appear on the return, and the Court ought not to enquire of any matter out of it) that a ſuppoſed contempt was, of a thing done out of the houſe, it would be hard for this Court to remand him. Suppoſe he were committed to a foreign priſon during the pleaſure of the lords, no doubt that would be an illegal commitment, againſt MAGNA CHARTA, and THE PETITION OF RIGHT. There the commitment had been expreſsly illegal; and it may be this commitment is no leſs: for if it had been expreſsly ſhewn, and he be remanded, he is committed by this Court, who are to anſwer for his impriſonment. But SECONDLY, The duration of the impriſonment, during the pleaſure of the king and of the houſe, is illegal and uncertain; for ſince it ought to determine in two courts, it can have no certain period. A commitment "until he ſhall be diſcharged by the courts of "king's bench and common pleas," is illegal; for the priſoner cannot apply himſelf in ſuch manner as to obtain a diſcharge. If a man be committed "till further order," he is bailable preſently; for that imports till he ſhall be delivered by due courſe of law; and if this commitment have not that ſenſe, it is illegal; for the pleaſure of the king is that which ſhall be determined according to law in his courts; as where the ſtatute of *Weſtminſter* 1. cap. 15. declares that he is repleviſable who is taken by command of the king, it ought to extend to an extrajudicial command, not in his courts of juſtice, to which all matters of judicature are delegated and diſtributed.

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2 Inſt. 186, 187.

(*a*) Lord Hudſon's Caſe, Hob. 109.
(*b*) Hob. 110.
(*c*) 8. Co. 40. b.
(*d*) The Year-Book 4. Hen. 7. pl. 18. Hob. 111.
(*e*) 1. Roll. Rep. 29.

WALLOP

WALLOP to the ſame purpoſe. He cited *Buſhel's Caſe (a)*, that the general return for "high contempts" was not ſufficient; and the Court that made the commitment in this caſe makes no difference; for otherwiſe one may be *impriſoned by the houſe of peers unjuſtly, for a matter relievable here, and yet ſhall be out of all relief by ſuch a return; for upon a ſuppoſition that this Court ought not to meddle where the perſon is committed by the peers, then any perſon, at any time, and for any cauſe, is to be ſubject to perpetual impriſonment at the pleaſure of the lords. But the law is otherwiſe; for though the houſe of lords is the ſupreme court, yet their juriſdiction is limited by the common and ſtatute-law; and their exceſſes are examinable in this court; for there is great difference between the errors and the exceſſes of a court, between an erroneous proceeding, and a proceeding without juriſdiction, which is void, and a meer nullity. In the parliament, the king would have one attaint of treaſon, and loſe his land; and the lords aſſented, but nothing was ſaid of the commons; wherefore all the Juſtices held that it was no act, and he was reſtored to his land; and without doubt, in the ſame caſe, if the party had been impriſoned, the Juſtices muſt have made the like reſolution, that he ought to have been diſcharged. It is a ſoleciſm, that a man ſhall be impriſoned by a limited juriſdiction, and it ſhall not be examinable whether the cauſe were within their juriſdiction or no? If the lords without the commons ſhould grant a tax, and one that refuſed to pay it ſhould be impriſoned, the tax is void; but by a general commitment the party ſhall be remedileſs: ſo if the lords ſhall award a *capias* for treaſon or felony. By theſe inſtances it appears, that their juriſdiction was reſtrained by the common-law; and it is likewiſe reſtrained by divers acts of parliament. 1. *Hen.* 4. cap. 14. No appeals ſhall be made, or any way purſued in parliament. And when a ſtatute is made, a power is implicitly given to this court by the fundamental conſtitution, which makes the Judges expoſitors of acts of parliament. And peradventure if all this caſe appeared upon the return, this might be a caſe in which they were reſtrained by the ſtatute 4. *Hen.* 8. cap. 8. "That all "ſuits, accuſements, condemnations, puniſhments, corrections, "&c. at any time from henceforth to be put or had upon any "member for any bill, ſpeaking or reaſoning of any matters con-"cerning the parliament to be communed or treated of, ſhall be "utterly void and of none effect." *Now it doth not appear but this is a correction or puniſhment impoſed upon THE EARL contrary to the ſtatute. There is no queſtion made now in the power of the lords; but it is only urged, that it is neceſſary for them to declare by virtue of what power they proceed; otherwiſe the liberty of every ENGLISHMAN ſhall be ſubject to the lords, whereof they may deprive any of them againſt an act of parliament; but no uſage can juſtify ſuch a proceeding *(b)*. *The Duke of Suffolk* was impeached by the commons of high treaſon and miſdemea-

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See the YEAR-BOOK 4. Hen. 7. pl. 18.

* [149]

(a) Vaugh. 137. 2. Jones, 13. 3. Keb. 322. Ante, 119.

(b) Elleſmere's Caſe of the Poſtnati, 19.

nors;

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nors; the lords were in doubt whether they would proceed on such general impeachment to impriſon the Duke; and the advice of the Judges being demanded, and their reſolutions given in the negative, the lords were ſatisfied: this caſe is mentioned with deſign to ſhew the reſpect given to the Judges, and that the Judges have determined the higheſt matters in parliament. At a conference between the lords and commons *(a)* concerning the rights and privileges of the ſubject, it was declared and agreed, That no freeman ought to be reſtrained or committed by command of the king or privy-council, or any other (in which the houſe of lords are included), unleſs ſome cauſe of the commitment, reſtraint, or detainer, be ſet forth for which by law he ought to be committed, &c. Now if the king (who is the head of the parliament) or his privy-council (which is the court of ſtate) ought therefore to proceed in a legal manner, this ſolemn reſolution ought to end all debates of this matter. It is true, that in *Ruſſell's Caſe (b)* COKE is of opinion, that the privy-council may commit without ſhewing cauſe; but in his more mature age he was of another opinion: and accordingly the law is declared in THE PETITION OF RIGHT; and no inconvenience will enſue to the lords by making their warrants more certain.

1. Leon. 71.
2. Leon. 175.

SMITH argued to the ſame purpoſe, and ſaid, that a judge cannot make a judgment unleſs the fact appear to him on a *habeas corpus*; the judge can only take notice of the fact returned. It is lawful for any ſubject that finds himſelf aggrieved by any ſentence or judgment, to petition the king in an humble manner for redreſs; and where the ſubject is reſtrained of his liberty, the proper place for him to apply himſelf to, is this Court, which hath the ſupreme power as to this purpoſe over all other courts; and an *habeas corpus* iſſuing here, the king ought to have an account of his ſubjects *(c)*: and alſo the commitment was by the lords; yet if it be illegal, this Court is obliged to diſcharge the priſoner as well as if he had been illegally impriſoned by any other court. The houſe of peers is an high court, but the king's bench hath ever been entruſted with the liberty of the ſubject, and if it were otherwiſe (in caſe of impriſonment by the peers) the power of the king were leſs abſolute than that of the lords. It doth not appear but that this commitment was for breach of privilege; but nevertheleſs if it were ſo, this Court may give relief, as appears in *Sir —— Binion's Caſe* (*d*) before cited; for the Court, which hath the power to judge what is privilege, hath alſo power to judge what is contempt againſt privilege: if the Judges may judge of an act of parliament, *à fortiori* they may judge of an order of the lords. In *Butler's Caſe (e)*, where he in reverſion brought an action of waſte, and died before judgment, and his heir brought an action for the ſame waſte; and

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(*a*) 3. April, Car. 1.
(*b*) 1. Roll. 129.
(*c*) Wetherly v. Wetherly, 2. Ro. Ab. 69.
(*d*) 1. Lev. 111. 1. Show. 99. Ante, page 145. note (*b*).
(*e*) 12. Edw. 1.

the

the king and the lords determined that it did lie, and commanded the Judges to give judgment accordingly for the time to come; this is publiſhed as a ſtatute by *Pulton (a)*: but in *Ryley (b)* it appears, that it is only an order of the king and the lords, and that was the cauſe that the Judges conceived that they were not bound by it; but 39. *Edw.* 3. *pl.* 13. and ever ſince have adjudged the contrary. If it be admitted, that for breach of privilege the lords may commit, yet it ought to appear on the commitment that that was the cauſe; for otherwiſe that may be called a breach of privilege which is only a refuſing to anſwer to an action, whereof the houſe of lords is reſtrained to hold plea by the ſtatute 1. *Hen.* 4. c. . and for a contempt committed out of the houſe they cannot commit; for the word "appeal" in the ſtatute extends to all miſdemeanors, as it was reſolved by all the Judges in the Earl of *Clarendon's Caſe (c)*. If the impriſonment be not lawful, the Court ought not to remand to his wrongful impriſonment, for that would be an act of injuſtice to impriſon him *de novo (d)*. * It doth not appear whether the contempt was a voluntary act, an omiſſion, or an inadvertency, and he hath now ſuffered five months impriſonment: falſe impriſonment is not only where the commitment is unjuſt, but where the detainer is too long *(e)*. In this caſe, if this Court cannot give remedy, peradventure the impriſonment ſhall be perpetual; for the king (as the law is now taken) may adjourn the parliament for ten or twenty years *(f)*. But all this is upon ſuppoſition, that the ſeſſion hath continuance; but I conceive, that by the king's giving his royal aſſent to ſeveral laws which have been enacted, the ſeſſion is determined; and then the order for the impriſonment is alſo determined. It appears by *Brook*, tit. "*Parliament*," 36. that every ſeſſion in which the king ſigns bills is a day of itſelf, and a ſeſſion of itſelf. By 1. *Car.* 1. c. 7. a ſpecial act is made, that the giving of the royal aſſent to ſeveral bills ſhall not determine the ſeſſion: it is true, that it is there ſaid to be made for avoiding all doubts, but in the ſtatute 16. *Car.* 1. c. 1. there is a proviſo to the ſame purpoſe; and alſo in the 12. *Car.* 2. c. 1. By the opinion of COKE *(g)* the royal aſſent doth not determine a ſeſſion; but the authorities on which he relies do not warrant his opinion: for FIRST, In the parliament roll *(h)* it appears, that the royal aſſent was given to the act for the reverſal of the attainder of the members of parliament the ſame day that it was given to the other bills; and in the ſame year the ſame parliament aſſembled again; and then it is probable the members who had been attainted were preſent, and not before. The caſe in 8. *Rich.* 2. n. 13. is only a judgment in caſe of treaſon, by virtue

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The 16. Car. 1. c. 1. is repealed by 16. Car. 2. c. 1. See 1. Black. Comm. 151.

(a) Pulton's edit. of the Statutes from Magna Charta to Car. 2.

(b) Ryley's Placita Parliamentaria, page 93.

(c) 4. July, 1663. 2. St. Trials, 55.

(d) Vaugh. 156.

(e) 2. Inſt. 53.

(f) But ſee the 4. Edw. 3. c. 14. the 36. Edw. 3. c. 10. the 16. Car. 2. c. 1. the 1. Will. & Mary, ſt. 2. c. 2. and the 6. Will. and Mary, c. 3.

(g) 4. Inſt. 27.

(h) 1. Hen. 6. pl. 7.

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of a power reſerved to them on the ſtatute of 25. *Edw.* 3. (*a*), and is not an act of parliament. The aid is firſt entered on the roll (*b*), but upon condition that the king will grant their other petitions. The inference my LORD COKE makes, that the act for the attainder of *Queen Katherine*, 33. *Hen.* 8. c. 21. was paſſed before the determination of the ſeſſion, is an error; for though ſhe was executed during the ſeſſion, yet it was on a judgment given againſt the queen by the commiſſioners of *oyer* and *terminer*, and the ſubſequent act was only an act of confirmation: but COKE
* [152] ought to be excuſed, for all his notes and papers * were taken from him; ſo that this book (*c*) did not receive his laſt hand: but it is obſervable, that he was one of the members of parliament when the ſpecial act was paſſed (*d*). And afterwards the parliament did proceed in that ſeſſion only, where there was a precedent agreement betwixt the king and the houſes. And ſo concluded, that the order is determined with the ſeſſion, and that *the Earl of Shaftſbury* ought to be diſcharged.

AYRES argued to the ſame effect, and ſaid, that the warrant is not ſufficient; for it doth not appear that it was made by the juriſdiction that is exerciſed in the houſe of peers; for that is *coram rege in parliamento*; ſo that the king and the commons are preſent in ſuppoſition of law: and the writ of error in parliament is, "*Inſpecto recordo, nos de conſilio, adviſamento dominorum* "*ſpiritual. et temporalium et commun. in parliament. præd. exiſten.* "*&c.*" It would not be difficult to prove, that anciently the commons did aſſiſt there: and now it ſhall be intended, that they were preſent; for there can be no averment againſt the record. The lords do ſeveral acts as a diſtinct houſe; as the debating of bills, enquiring of franchiſes and privileges, &c. And the warrant in this caſe (being by the lords ſpiritual and temporal) cannot be intended otherwiſe, but it was done by them in their diſtinct capacity; and the commitment being during the pleaſure of the king and of the houſe of peers, it is manifeſt, that the king is principal, and his pleaſure ought to be determined in this court. If the lords ſhould commit a great miniſter of ſtate whoſe advice is neceſſary for the king and his realm, it cannot be imagined that the king ſhould be without remedy for his ſubject, but that he may have him diſcharged by his writ out of this court. This preſent receſs is not an ordinary adjournment; for it is entered in the journal, that the parliament ſhall not be aſſembled at the day of adjournment, but adjourned or prorogued till another day, if the king do not ſignify his pleaſure by proclamation.—Some other exceptions were taken to the return.—FIRST, That no commitment is returned, but only a warrant to the conſtable of the Tower to receive him.—

(*a*) Roll. Abr. "Parliament," 7 Hen. 4. pl. 29.
(*b*) 14. Edw. 3. pl. 7.
(*c*) 3. Inſt.
(*d*) 1. Car. 1. c. 7.

SECONDLY,

*SECONDLY, the return does not anſwer the mandate of the writ; for it is to have the body of ANTHONY *Earl of Shaftſbury*; and the return is of the warrant for the impriſonment of ANTHONY ASHLY COOPER, *Earl of Shaftſbury.*

MAYNARD, *Serjeant*, to maintain the return. The houſe of lords is the ſupreme court of the realm: it is true, this Court is ſuperior to all courts of ordinary juriſdiction. If this commitment had been by any inferior court, it could not have been maintained: but the commitment is by a court that is not under the controul of this court, and that court is in law ſitting at this time; and ſo the expreſſing of the contempt particularly is matter which continues in the deliberation of the court. It is true, this Court ought to determine what the law is in every caſe that comes before them; and in this caſe the queſtion is only, Whether this Court can judge of a contempt committed in parliament during the ſame ſeſſion of parliament, and diſcharge one committed for ſuch contempt? When a queſtion ariſes in an action depending in this court, the Court may determine it: but now the queſtion is, Whether the lords have capacity to determine their own privileges? and, Whether this Court can controul their determination, and diſcharge (during the ſeſſion) a peer committed for contempt? The Judges have often demanded what the law is, and how a ſtatute ſhould be expounded, of the lords in parliament, as in the ſtatute of Amendments, 40. *Edw.* 3. 84. 6. 8. *Co.* 157, 158.: *à fortiori*, the Court ought to demand their opinion when a doubt ariſes, on an order made by the houſe of lords now ſitting. As to the duration of the impriſonment, doubtleſs the pleaſure of the king is to be determined in the ſame court where judgment was given. As alſo to the determination of the ſeſſion, the opinion of COKE is good law; and the addition of *proviſoes* in many acts of parliament, is only *in majorem cautelam.*

JONES, *Attorney General*, to the ſame effect. As to the uncertainty of the commitment, it is to be conſidered, That this caſe differs from all other caſes in two circumſtances: FIRST, The perſon, that is a member of the houſe by which *he is committed. I take it upon me to ſay, that the caſe would be different if the perſon committed were not a peer.—SECONDLY, The Court which doth commit; which is a ſuperior court to this court; and therefore, if the contempt had been particularly ſhewn, of what judgment ſoever this Court would have been as to that contempt, yet they could not have diſcharged the earl, and thereby take upon them a juriſdiction over the houſe of peers. The Judges in no age have taken upon them the judgment of what is *lex et conſuetudo parliamenti*; but here the attempt is to engage the Judges to give their opinion in a matter whereof they might have refuſed to have given it, if it had been demanded in parliament. This is true, if an action be brought where privilege is pleaded, the Court ought to judge of it as an incident to the ſuit, whereof the Court was poſſeſſed; but that will be no warrant for this Court to aſſume a judgment of an original matter ariſing in parliament.

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parliament. And that which is ſaid of the Judges power to expound ſtatutes, cannot be denied; but it is not applicable to this caſe. By the ſame reaſon that this commitment is queſtioned, every commitment of the houſe of commons may be likewiſe queſtioned in this court.—It is objected, That there will be a failure of juſtice if the Court ſhould not diſcharge the earl; but the contrary is true, for if he be diſcharged there would be a manifeſt failure of juſtice; for offences of parliament cannot be puniſhed anywhere but in parliament; and therefore the earl would be delivered from all manner of puniſhment for his offence, if he be diſcharged (for the Court cannot take bail, but where they have a juriſdiction of the matter), and ſo delivered out of the hands of the lords, who only have power to puniſh him.—It is objected, that the contempt is not ſaid to be committed in the houſe of peers; but it may well be intended to be committed there; for it appears he is a member of that houſe, and that the contempt was againſt the houſe. And beſides, there are contempts whereof they have cognizance, though they are committed out of the houſe.—It is objected, That it is poſſible this contempt was committed before the general pardon; but ſurely ſuch injuſtice ſhould not be ſuppoſed in the ſupreme court; and it may well be ſuppoſed to be committed during the ſeſſion, in which the *commitment to priſon was. It would be a great difficulty for the lords to make their commitments ſo exact and particular, when they are employed in the various affairs of the realm: and it hath been adjudged on a return out of the chancery, of a commitment for a contempt againſt a decree, that it was good, and the decree was not ſhewn.—The limitation of the impriſonment is well; for if the king, or the houſe, determine their pleaſure, he ſhall be diſcharged; for then it is not the pleaſure of both that he ſhould be detained; and the addition of theſe words "during the pleaſure" is no more than was before implied by the law: for if theſe words had been omitted, yet the king might have pardoned the contempt, if he would have expreſſed his pleaſure under the broad ſeal. If judgment be given in this court, That one ſhould be impriſoned during the king's pleaſure, his pleaſure ought to be determined by pardon, and not by any act of this court. So that the king would have no prejudice by the impriſonment of a great miniſter, becauſe he could diſcharge him by a pardon: the double limitation is for the benefit of the priſoner, who ought not to complain of the duration of the impriſonment, ſince he hath neglected to make application for his diſcharge in the ordinary way. I confeſs, by the determination of the ſeſſion, the orders made the ſame ſeſſion are diſcharged; but I ſhall not affirm, whether this preſent order be diſcharged or no, becauſe it is a judgment: but this is not the preſent caſe; for the ſeſſion continues notwithſtanding the royal aſſent given to ſeveral bills, according to the opinion of COKE, and of all the Judges. Every proviſo in an act of parliament is not a determination what the law was before; for they are often added for the ſatisfaction of thoſe that are ignorant of the law.

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Hutton, 61, 62.

WINNINGTON,

WINNINGTON, *Solicitor General*, to the ſame purpoſe: In the great caſe of *Mr. Selden* (*a*), the warrant was "for *notable contempts* committed againſt us and our government; and ſtirring "up ſedition;" and though that be almoſt as general as in our caſe, yet no objection was made in that cauſe in any of the arguments. But I agree, that this return could not have been maintained, if it were of an inferior court; but during the ſeſſion, this court can take no cognizance of the matter: * and the inconveniency would be great, if the law were otherwiſe taken, for this court might adjudge one way, and the houſe of peers another way; which doubtleſs would not be for the advantage or liberty of the ſubject. For the avoiding of this miſchief, it was agreed by this whole Court, in the caſe of *Barnadiſton v. Soames* (*b*), that the action, for the double return, could not be brought in this court, before the parliament had determined the right of the election, leſt there ſhould be a difference between the judgments of the two courts. When a judgment of the lords comes into this court (though it be of the reverſal of a judgment of this court), this court is obliged to execute it; but the judgment was never examined or corrected here. In the caſe of my *Lord Hollis* (*c*) it was reſolved, that this court hath no juriſdiction of a miſdemeanor committed in the parliament; when the parliament is determined, the Judges are expoſitors of the acts, and are intruſted with the lives, liberties, and fortunes of the ſubjects: and (if the ſeſſion were determined) the earl might apply himſelf to this court; for the ſubject ſhall not be without place where he may reſort for the recovery of his liberty; but this ſeſſion is not determined. For the moſt part the royal aſſent is given the laſt day of parliament; as *Plowden* ſaith, in *Partridge's Caſe* (*d*): yet the giving of the royal aſſent doth not make it the laſt day of the parliament, without a ſubſequent diſſolution or prorogation. And the Court judicially takes notice of prorogations or adjournments of parliament: *Cro. Jac.* 111. *Ford v. Hunter*: and by conſequence, by the laſt adjournment, no order is diſcontinued, but remains as if the parliament were actually aſſembled: *Cro. Jac.* 242. *Sir Charles Heydon's Caſe*: ſo that the earl ought to apply himſelf to the lords, who are his proper judges. It ought to be obſerved, that theſe attempts are *primæ impreſſionis*; and though impriſonments for contempts have been frequent, by the one or the other houſe, till now no perſon ever ſought enlargement here. The Court was obliged in juſtice to grant the *habeas corpus*; but when, the whole matter being diſcloſed, it appears upon the return, that the caſe belongs *ad aliud examen*, they ought to remand the party. As to the limitation of the impriſonment, the king may determine his pleaſure by pardon under the great ſeal, or * warrant for his diſcharge under the privy ſeal, as in the caſe of *Reniger v. Fogaſſa*, *Plow.* 20.—As to the exception, that no commitment is returned, the conſtable can only ſhew what concerns himſelf, which is the

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(*a*) Ruſh. Coll. 18, 19. in the Appendix.

(*b*) 2. Lev. 114. Pollexfen 470. 3. Keb. 365. 369. 419. 428. 439. 442. 586. 664. 7. St. Tr. 428. 1. Freem. 380. 387. 390.

(*c*) 1. St. Tr. 322. 7. St. Tr. 242.

(*d*) Plowd. 78. Dyer, 74.

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warrant to him directed; and the writ doth not require him to return any thing elſe.—As to the exception, that he is otherwiſe named in the commitment than in the writ; the writ requires the body of "ANTHONY *Earl of Shaftſbury, quocunque nomine cenſeatur*" in the commitment.

THE COURT delivered their opinion as follows:

SIR THOMAS JONES, *Juſtice*, ſaid, Such a return, made by an ordinary court of juſtice, would have been ill and uncertain; but the caſe is different when it comes from this high court, to which ſo great reſpect hath been paid by our predeceſſors, that they deferred the determination of doubts conceived in an act of parliament, until they had received the advice of the lords in parliament. But now, inſtead thereof, it is demanded of us to controul the judgment of all the peers given on a member of their own houſe, and during the continuance of the ſeſſion. The caſes where the courts of *Weſtminſter* have taken cognizance of privilege, differ from this caſe; for in thoſe it was only an incident to a caſe before them, which was of their cognizance; but the direct point of the matter now is the judgment of the lords. The courſe of all courts ought to be conſidered; for that is the law of the court: *Lane's Caſe*, 2. *Co.* 16. And it hath not been affirmed, that the uſage of the houſe of lords hath been to expreſs the matter more punctually on commitments for contempts; and therefore I ſhall take it to be according to the courſe of parliament. 4 *Inſt.* 50. it is ſaid, that the judges are aſſiſtants to the Lords, to inform them of the common law; but they ought not to judge of any law, cuſtom, or uſage of parliament. The objection, as to the continuance of the impriſonment, hath received a plain anſwer; for it ſhall be determined by the pleaſure of the king, or of the lords; and if it were otherwiſe, yet the king could pardon the contempt under THE GREAT SEAL, or diſcharge the impriſonment under THE PRIVY SEAL. I ſhall not ſay what would be the conſequence (as to this impriſonment) if the ſeſſion
* [158] were determined, for * that is not the preſent caſe; but as the caſe is, this court can neither bail nor diſcharge the earl.

WYLDE, *Juſtice*. The return, no doubt, is illegal; but the queſtion is on a point of juriſdiction, Whether it may be examined here? This court cannot intermeddle with the tranſactions of the high court of peers in parliament, during the ſeſſion, which is not determined; and therefore the certainty or uncertainty of the return is not material, for it is not examinable here; but if the ſeſſion had been determined, I ſhould be of opinion that he ought to be diſcharged.

See 2. Show. 335. to 338.

RAINSFORD, *Chief Juſtice*. This court hath no juriſdiction of the cauſe, and therefore the form of the return is not conſiderable. We ought not to extend our juriſdiction beyond its due limits, and the actions of our predeceſſors will not warrant us in ſuch attempts: the conſequence would be very miſchievous, if this court

ſhould

THE EARL OF SHAFTESBURY'S CASE.

ſhould deliver the members of the houſes of peers and commons who are committed. The buſineſs of parliament may be thereby retarded; for perhaps the commitment was for evil behaviour, or indecent reflections on the members, to the diſturbance of the affairs of parliament. The commitment, in this caſe, is not for *ſafe cuſtody*, but he is in *execution* on the judgment given by the lords for the contempt; and therefore if he be bailed, he will be delivered out of execution; becauſe for a contempt *in facie curiæ*, there is no other judgment or execution. This court hath no juriſdiction of the matter, and therefore he ought to be remanded. I deliver no opinion, if it would be otherwiſe in caſe of prorogation.

1. Ld. Ray. 18. Skin. 56. 2. Hawk. P. C. 171. 2. Term Rep. 190.

TWISDEN, *Juſtice*, was abſent; but he deſired MR. JUSTICE JONES to declare, that his opinion was, that the party ought to be remanded.

And ſo he was remanded by THE COURT (*a*).

(*a*) See the note to 2. Hawk. P. C. ch. 15. ſ. 73. the ſixth edition, where all the caſes reſpecting the power of parliament to commit in execution for contempt of privilege are collected.

TRINITY TERM,

The Twenty-Sixth of Charles the Second,

IN

The King's Bench.

Friday, June 19, 1674.

Sir Matthew Hale, *Knt. Chief Juſtice.*
Sir Thomas Twiſden, *Knt.*
Sir Richard Rainsford, *Knt.* } *Juſtices.*
Sir William Wylde, *Knt.*
Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington *Knt. Solicitor General.*

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* [159]
Caſe 1.

* Pybus *againſt* Mitford.

Trinity Term, 20. *Car.* 2. *Roll* 703.

If a man covenant to ſtand ſeiſed to the uſe of the heirs male of his body by a ſecond wife, a uſe immediately ariſes to the covenantor for life; and the remainder over, being a remainder in ſpecial tail, becomes executed in him; ſo that on his death the ſon by the ſecond venter ſhall take the eſtate by *deſcent*, as *ſpecial heir*, although he have a ſon by his firſt wife living at the time of his death.—S. C. ante, 98. 121. S. C. 3. Keb. 239. 316. 338. S. C. 2. Lev. 75. S. C. Ray. 228. S. C. 1. Vent. 372. S. C. 1. Freem. 351. 369. S. C. 2. Danv. 556. Poſt. 226. 237. 1. Roll. Abr. 240. Hob. 30. Co. Lit. 22, 23. 2. Mod. 207. 8. Mod. 23. 9. Mod. 162. 10. Mod. 421. 436. 11. Mod. 96. 152. 181. 12. Mod. 38. 101. Gilb. Eq. Rep. 20. 120. Prec. in Chan. 342. 467. Comyns, 119. 160. 2. Peer. Wms. 139. 3. Peer. Wms. 63. 367. 2. Ld. Ray. 854. Poſſext. 467. 582. Saund. on Uſes and Truſts, 134. 176. 180. 3. Com. Dig. "Deſcent," 3. Salk. 336. 11. Mod. 189. 2. Peer. Wms. 1. Prec. in Ch. 54. 442. 461. Mr. Hargrave's note (3), Co. Lit. 24. b. in page 31. a. and note (2), page 164. a. 1. Chan. Caſ. 145. 1. Stra. 41. Gilb. Rep. 116. 131. 5. Burr. 2615. Powell on Dev. 374. 389. 1. Wilſ. 31. 5. Burr. 2626. Ambler's Rep. 11. 4. Term Rep. 82.

THIS CASE, having been ſeveral times argued at the bar, received judgment this Term.

The caſe was, *Michael Mitford* was ſeiſed of the lands in queſtion in fee, and had iſſue by his ſecond wife, *Ralph Mitford*; and

on

on the 23. *January*, 21. *Jac.* 1. by indenture made between the ſaid *Michael* of the one part, and *Sir Ralph Dalivell* and others of the other part, HE COVENANTED to ſtand immediately ſeiſed, after the date of the ſaid indenture (amongſt others) of the lands in queſtion, by theſe words, *viz.* "to the uſe of the heirs males "of the ſaid *Michael Mitford*, begotten, or to be begotten, on the "body of *Jane* his wife, the reverſion to his own right heirs." After which *Michael* died, leaving iſſue *Robert* his ſon and heir by a firſt venter, and the ſaid *Ralph* by *Jane* his ſecond wife. After the death of *Michael*, *Robert* entered, and from *Robert*, by divers meſne conveyances, a title was deduced to the heir of the plaintiff. *Ralph* had iſſue *Robert*, the defendant.

And in this ſpecial verdict, the queſtion was, If any uſe did ariſe to *Ralph* by this indenture made 23. *January*, 21. *Jac.* 1.?

HALE, *Chief Juſtice*, RAINSFORD and WYLDE, *Juſtices*, (againſt the opinion of TWISDEN) were of opinion, that *Michael Mitford* took an eſtate for life by implication and conſequence, and ſo had an eſtate-tail.

HALE, *Chief Juſtice*, ſaid, FIRST, It were clear if an eſtate for life had been limited to *Michael*, and to the heirs males of the body of *Michael*, to be begotten on the body of his ſecond wife, that had been an eſtate-tail.—SECONDLY, Which way ſoever it be, the eſtate is lodged in *Michael* during his life.—THIRDLY, There is a great difference between eſtates to be conveyed by the rules of the common-law, and eſtates conveyed by way of uſe; for he may mould the uſe in himſelf in what eſtate he will. Theſe things being premiſed, he ſaid, this eſtate being turned by operation of * law into an eſtate in *Michael*, is as ſtrong as if he had limited an eſtate in himſelf for life.—SECONDLY, A limitation to the heirs of his body, is in effect a limitation to the uſe of himſelf; for his heirs are included in himſelf.—THIRDLY, It is perfectly according to the intention of the party, which was, That his eldeſt ſon ſhould not take, but that the iſſue of the ſecond wife ſhould take.

* [160]

Poſt. 237. 327. Co. Lit. 22. a. 1. Vezey, 153.

FIRST it is objected, That his intent appears to be, that it ſhould take effect as a future uſe. But when a man limits a uſe to commence *in futuro*, and there is ſuch a deſcendible quality left in him that his heirs may take in the mean time, there it ſhall operate ſolely by way of future uſe: as if a man covenant to ſtand ſeiſed to the uſe of *J. S.* after the expiration of forty years, or after the death of *J. D.* there no preſent alteration of the eſtate is made, but it is only a future uſe, becauſe the father or the anceſtor had ſuch an intereſt left in him which might deſcend to his heir, *viz.* during the years, or during the life of *J. D.* But when no eſtate may, by reaſon of the limitation, deſcend to the heir until the contingency happen, there the eſtate of the covenantor is moulded to an eſtate for life.

1. Vent. 379. Ante, 111, 122. Poſt. 237, 238.

PYRUS *againſt* MITFORD.

SECONDLY it is objected, That this would be to create an eſtate by implication. But we are not here to create an eſtate, but only to qualify an eſtate which was in the anceſtor before.

THIRDLY it is objected, That the old fee-ſimple ſhould be left in him.—But the covenantor had qualified this eſtate, and converted it into an eſtate-tail, *viz.* part of the old eſtate.

FOURTHLY it is objected, That the intention of the parties appears, that it ſhould operate by way of future uſe; for that of other lands he covenanted to ſtand ſeiſed to the uſe of himſelf, and his heirs of his body. – But it is not the intention of the party that ſhall controul the operation of law; and to the caſe 1. *Inſt.* 22. though it be objected, that it was not neceſſary at the law to raiſe an eſtate for life by implication, yet my LORD COKE hath taken notice what he had ſaid in the caſe of *Parnell v. Fenn*, *Roll. Rep.* 240. If a man make a feoffment to the uſe of the heirs of *his body, that is an eſtate for life in the feoffor: and in *Engleſield's Caſe*, as it is reported in *Moore* 303. it is agreed, that if a man covenant to ſtand ſeiſed to a uſe to commence after his death, the covenantor thereby is become ſeiſed for life.

* [161]

1. Co. 103. b. Co. Lit. 24. Hob. 31. Poſt. 338.

TWISDEN, RAINSFORD, and WYLDE, *Juſtices*, as to the ſecond point held, That no future uſe would ariſe to *Ralph*, becauſe he is not heir at common law; and none can *purchaſe* by the name of heir, unleſs he be heir at common law.—But HALE, *Chief Juſtice*, was againſt them in this point; and he held, That if *Ralph* could not take by *deſcent*, yet he might well take by *purchaſe*:—FIRST, Becauſe before the ſtatute *de donis*, a limitation might be made to this heir, and ſo he was *a ſpecial heir* at common law:—SECONDLY, It is apparent that he had taken notice that he had an heir at the common law: ſo his intent is evident, that the heir at common law ſhould not take.—But on THE FIRST POINT judgment was given for the defendant.

1. Vent. 381, 382.

Co. Lit. 24.

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[* This page is a blank in the former edition.]

CASES

CASES IN THE COMMON PLEAS

FROM

Michaelmas Term, 25. Car. 2.

TO

Trinity Term, 29. Car. 2. inclusive.

MICHAELMAS TERM,

The Twenty-Fifth of Charles the Second,

IN

The Common Pleas.

Sir John Vaughan, *Knt. Chief Justice.*
Sir Robert Atkins, *Knt.*
Sir Hugh Wyndham, *Knt.* } *Justices.*
Sir William Ellis, *Knt.*
Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

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* Anonymous.

Case 1.

IF a man be liable to pay a yearly sum, as treasurer to a church, or the like, to a sub-treasurer, or any other, and dies, the money being in arrear, an action of *assumpsit* cannot be maintained against his executors for these arrears: for although, *Assumpsit* cannot be maintained for the arrears of an annuity against executors, because there is no personal privity.—4. Co. 92. b. Yelv. 20. Moor, 433. 667. 10. Mod. 23. *Sed vide* Hambley v. Trott, Cowp. 375.

ANONYMOUS.

according to the resolution in *Slade's Case (a)*, which VAUGHAN, *Chief Justice*, said, was a strange resolution, an *assumpsit*, or an action of *debt*, is maintainable upon *a contract*, at the party's election; yet where there is no contract, nor any personal privity, as in this case there is not, an *assumpsit* will not lie.

In an action against an executor for a debt due from the testator out of a particular fund, it must be averred that the fund was solvent, &c.

And in an action of debt for these arrears the plaintiff must aver, that there is so much money in the treasury as he demands; and in this case of an action against executors, that there was so much at the time of the testator's death, &c.; for the money is due from him as treasurer, and not to be paid out of his own estate: as in an action against the king's receiver, the plaintiff must set forth, that he has so much money of the king's in his coffers.

(a) 4. Co. 92. Moor, 433. Yelv. 20. Godol. 176. 196. Hughes Ent. 3.

Case 2.

Magdalen College's Case.

The chancellor of the universities of *Oxford* or *Cambridge* shall be allowed *cognizance* of an action brought

* [164]

in the superior court against the president and scholars of a college for goods sold and delivered to their use.

8. *Hen.* 6. pl. 19, 20. 6. *Hen.* 7. pl. 9. 1. Roll. Abr. 492.

INDEBITATUS ASSUMPSIT against the president and scholars of *Magdalen College* in *Oxford*, for threescore pounds due for butter and cheese sold to the college. The chancellor of the university demanded *conusance*, by virtue of charters of privileges granted to the university by the king's progenitors, and confirmed by act of parliament; whereby, amongst other things, power is given them to hold plea in personal actions, wherein scholars, or other privileged persons, are * concerned; and concludes with an express demand of conusance in this particular cause.

BALDWIN, *Serjeant*, Their privilege extends not to this case; for a corporation is defendant; and their charters mention privileged persons only. Their charters are in derogation of the common law, and must be taken strictly. They make this demand upon charters confirmed by act of parliament: and they have a charter granted by *King Henry the Eighth*, which is confirmed by the statute 13. *Eliz.* c. 21.; but the charter of *King Charles the First* (which is the only charter that mentions corporations) is not confirmed by any act of parliament (*b*), and consequently is

Dyer, 157. 4. Inst. 227. Hard. 189. 506. 509. &c. 2. Vent. 362. 1. Chan. Cases, 237. Lit. Rep. 40. 304. N. Benl. 88. 2. Danv. 161. 166. Cro. Car. 73. 88. Hetl. 25. Skin. 665. 2. Vent. 362. 10. Mod. 126. 1. Ld. Ray. 342. 2. Ld. Ray. 1344. 2. Stra. 810. 1. Salk. 343 671. Annally's Rep. 241. 2. Will. 310. 406. 3. Bl. Com. 301. 2. Com. Dig. "Courts" (P 3.).

(*b*) The university of *Oxford* originally held *a cum i lest*; but by charters 34. Rich. 2. and 14. Hen. 8. confirmed by statute 13. Eliz. c. 29. it is incorporated *de novo*; and with its other franchises and privileges, this of *conusance* is established in all pleas for trespass, and in all complaints, misdemeanors, and crimes (except pleas of freehold) "*ubi* "*scholares, servi, aut ministri, sunt una* "*partium secundum statuta vel consuetu-* "*dines. &c.* VEL *secundum legem regni* "*at voluntatem cancellarii*; ITA QUOD "*Justic' de Banco Regis, de Communi* "*Banco, vel de assisis non se intromit-* "*tant.*" 4. Inst. 227. Litt. 10. 1. Salk. 343. and see Com. Dig. title, "University."

not

not material as to this demand; for a demand of conuſance is *ſtricti juris*. But admitting it material, the king's patent cannot deprive us of the benefit of the common law; and in the vice-chancellor's court they proceed by the civil law. If you allow this demand, there will be a failure of juſtice; for the defendants, being a corporation, cannot be arreſted; they can make no ſtipulation; the vice-chancellor's court cannot iſſue *diſtringas's* againſt their lands, nor can they be excommunicated. Precedents we find of corporations ſuing there as plaintiffs (in which caſe the aforementioned inconvenience does not enſue), but none of actions brought againſt corporations. MAGDALEN COLLEGE'S CASE.

MAYNARD, *contra*. Servants to colleges and officers of corporations have been allowed the privilege of the univerſity, which they could not have in their own right; and if in their maſter's right, *à fortiori* their maſters ſhall enjoy it. The word "*perſona*" in the demand will include *a corporation* well enough.

VAUGHAN, *Chief Juſtice*. Perhaps the words "*atque confirmat. &c.*" in the demand of conuſance are not material; for the privileges of the univerſity are grounded on their patents, which are good in law, whether confirmed by parliament or not. The word "*perſona*" does include corporations: 2. *Inſt.* 256. *per* COKE, upon the ſtatute of 31. *Eliz.* c. 7. of cottages and inmates (*a*). A demand of conuſance is not in derogation of the common law; for the king may by law grant *tenere placita*, though it may fall out to be in derogation of WESTMINSTER-HALL. Nor will there be a failure of juſtice; for when a corporation is defendant, they make them give bond, and put in ſtipulators that they will ſatisfy the judgment; and if they do not perform the condition of their * bond, they commit the bail. They have enjoyed theſe privileges ſome hundreds of years ago. (*a*) Repealed by 15. Geo. 3. c. 22. * [165]

The reſt of THE JUDGES agreed, that the univerſity ought to have conuſance.

But ATKINS, *Juſtice*, objected againſt the form of the demand, that the words "*perſona privilegiatâ*" cannot comprehend a corporation in a demand of conuſance, howſoever the ſenſe may carry it in an act of parliament.

ELLIS and WYNDHAM, *Juſtices*. If neither ſcholars nor privileged perſons had been mentioned, but an expreſs demand made of conuſance in this particular cauſe, it had then been ſufficient; and then a fault, if it be one in ſurpluſage, and a matter that comes in by way of preface, ſhall not hurt.

ATKINS, *Juſtice*. It is not a preface; they lay it as the foundation and ground of their claim.

The demand was allowed as to matter and form.

Rogers

Case 3.

Rogers *against* Danvers.

An executor who is bound in a *joint and several* bond with his teſtator, may plead the bond and no aſſets *ultra*, or may give payment of it in evidence under a *plene adminiſtravit*.

S. C. 1. Freem. 227. 1. Lev. 132. 191. 201. 227. 261. 2. Lev. 40. 118. 124. 3. Lev. 311. 1. Sid. 404. Raym. 153.

DEBT againſt *S. Danvers* and *D. Danvers*, executors of *G. Danvers*, upon a bond of one hundred pounds entered into by the teſtator. The defendants pleaded, that *G. Danvers*, the teſtator, had acknowledged a recognizance in the nature of A STATUTE STAPLE of twelve hundred pounds to *J. S.* and that they have no aſſets *ultra*, &c. The plaintiff replied, that *D. Danvers*, one of the defendants, was bound, together with the teſtator, in that ſtatute; to which the defendants demur.

BALDWIN, *Serjeant*, for the defendant. If this plea were not good, we might be doubly charged. It is true, one of us acknowledged the ſtatute likewiſe, but in this action we are ſued as executors. This ſtatute of twelve hundred pounds was joint and ſeveral; ſo that the conuſee may at his election either ſue the ſurviving conuſor, or the executors of him that is dead; ſo that the teſtator's goods that are in our hands are liable to this ſtatute. It runs, "*conceſſerunt ſe et utrumque eorum.*" If it were joint, the charge would ſurvive, and then it were againſt us. It is common for executors, upon "*pleinment adminiſter*" pleaded, to give in evidence payment of bonds in which themſelves were bound with the teſtator; and ſometimes * ſuch perſons are made executors for their ſecurity.

* [166]

Vaugh. 104. Carter, 221. 2. Lutw. 1421. 2. Mod. 36. 4. Mod. 63. 296. 8. Mod. 288. 9. Mod. 89. 10. Mod. 171. 315. 426. Caſes Temp. Talb. 240.

THE COURT was of opinion againſt the plaintiff; whereupon he prayed leave to diſcontinue; and had it.

Caſe 4.

Amie *against* Andrews.

A promiſe made by *A.* to pay a debt due from *B.* to *C.* in conſideration that *C* bring two witneſſes to prove it on oath, before a juſtice of peace, to be a juſt debt, is good, and will ſuſtain an *aſſumpſit*.

S. C. 1. Danv. 45. Ante 43 Poſt. 169. 284. Cro. Eliz. 469. 2. Saund. 136. 7. Mod. 13. 10. Mod. 295. 1. Salk. 25. 28. 1. Ld. Ray. 358. 368. 2. Ld. Ray. 753. 759. 838. 909. 919. 982. 1. Stra. 94. 592. 2. Stra. 933. 1027.

ASSUMPSIT. The plaintiff declares, That whereas the father of the defendant was indebted to him in twenty pounds for malt ſold, and promiſed to pay it; that the defendant, in conſideration that the plaintiff would bring two witneſſes before a juſtice of peace, who upon their oaths ſhould depoſe, that the defendant's father was indebted to the plaintiff, and promiſed payment, aſſumed and promiſed to pay the money: then avers, that he did bring two witneſſes, &c. who did ſwear, &c. The defendant pleaded *non aſſumpſit*; which was found againſt him.

SERJEANT BALDWIN moved in arreſt of judgment, that the conſideration was not lawful (*a*); becauſe a juſtice of peace not having power to adminiſter an oath in this caſe, it is an extra-judicial oath, and conſequently unlawful.

(*a*) See the caſe of Elmes v. Wills, 1. H. Bl. Rep. 64.

And

And VAUGHAN, *Chief Juſtice*, was of opinion, that every oath not legally adminiſtered and taken is within the ſtatute againſt prophane ſwearing (*a*). And he ſaid, it would be of dangerous conſequence to countenance theſe extrajudicial oaths, for that it would tend to the overthrowing of legal proofs (*b*).

AMIE *againſt* ANDREWS.

WYNDHAM and ATKINS, *Juſtices*, thought it was not a prophane oath, nor within the ſtatute of *King James*, becauſe it tended to the determining of a controverſy.—And accordingly the plaintiff had judgment.

(*a*) 21. Jac. 1. c. 20. repealed and re-enacted by 19. Geo. 2. c. 21. See 2. Mod. 59. 10. Mod. 213. Stra. 498. 1. Hawk. P. C. 12.

(*b*) See Gilbert's Law of Evidence, 4th edit. 66.

* Horton *againſt* Wilſon.

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Caſe 5.

A PROHIBITION was prayed to ſtay a ſuit in the ſpiritual court commenced by a proctor for his fees.

If a proctor libel in the ſpiritual court for fees in a ſuit there, and alſo for the *expences* of a journey, the charge of a meſſenger, and other diſburſements, a prohibition ſhall go as to all except *the fees*.

S.C. 3. Keb. 203. S. C. 1. Freem. 129. 2. Danv. 434. Skin. 589. 2. Keb. 615. 3. Keb. 441. 516. 1. Salk. 330. 334. Comyns, 18. 4. Mod. 254. 5. Mod. 242. 238. 10. Mod. 261. 440. 12. Mod. 583. 1. Ld. Ray. 703. 2. Stra. 1108.

VAUGHAN, *Chief Juſtice*, and WYNDHAM, *Juſtice*. No court can better judge of the fees, that have been due and uſual there, than themſelves. Moſt of their fees are appointed by conſtitutions provincial, and they prove them by them. A proctor lately libelled in the ſpiritual court for his fees, and, amongſt other things, demanded a groat for every inſtrument that had been read in the cauſe: the client pretended that he ought to have but fourpence for all. They gave ſentence for the defendant. The plaintiff appealed, and then a prohibition was prayed in the court of king's bench. The opinion of the Court was, That the libel for his fees was moſt proper for the ſpiritual court; but that becauſe the plaintiff there demanded a cuſtomary fee, that it ought to be determined by law, Whether ſuch a fee were cuſtomary, or no? And accordingly they granted a prohibition in that caſe. It is like the caſe of a *modus* for tithes; for whatever ariſeth out of the cuſtom of the kingdom, is properly determinable at common law. But in this caſe they were of opinion, that the ſpiritual court ought not to be prohibited; and therefore granted a prohibition *quoad* ſome other particulars in the libel which were of temporal cognizance, but not as to the ſuit for fees.

WYNDHAM, *Juſtice*, ſaid, If there had been an actual contract upon the retainer, the plaintiff ought to have ſued at law.

ATKINS, *Juſtice*, thought a prohibition ought to go for the whole. Fees, he ſaid, had no relation to the juriſdiction of the ſpiritual court, nor to the cauſe in which the proctor was retained. No ſuit ought to be ſuffered in the ſpiritual court, when the plaintiff has a remedy at law; as here he might in an action upon the caſe; for the retainer is an implied contract. A difference about the grant of the office of regiſter, in a biſhop's court, ſhall be tried at common law, though the *ſubjectum circa quod* be ſpiritual:

HORTON *against* WILSON.

ritual: 2. *Roll.* 285. *pl.* 45. and 2. *Roll. Abr.* 283. *Wadworth v. Andrewes.* Shall *a Six-Clerk* prefer a bill in equity for his fees? —But a prohibition was granted *quoad, &c (a).*

(*a*) S. C. 1. Free. 129. agrees; but in S. C. 3. Keb. 203. it is ſaid, that as the Court were divided no prohibition was awarded, but that the parties were ordered to declare, and the proceedings in the mean time to be ſtayed. In the S. C. cited 4. Mod. 254. and 5. Mod. 240, 241. it is ſaid the prohibition as to *the fees* was denied. See alſo 2. Roll. Rep. 59. And in the caſe of Johnſton *v.* Lee, Skin. 589. where the principal queſtion was, Whether proctors may ſue for their fees in the ſpiritual court? HOLT, *Chief Juſtice*, inclined they could not. In Johnſton *v.* Oxenden, 4. Mod. 255. a ſuit for a proctor's fees was ſtayed, 1. Ld. Ray. 703. And it has alſo been determined, that *a regiſter*, Salk. 333. 12. Mod. 608. *an apparitor*, Dougl. 3d edit. 629. *a pariſh-clerk*, 2. Stra. 1108. cannot ſue in the ſpiritual court for their fees. See 4. Com. Dig. 494.

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Caſe 6.

* Glever *againſt* Hynde and Others.

To an action of aſſault and battery, a plea that the plaintiff diſturbed a congregation while the miniſter was performing the rites of burial, and that the defendant (though neither conſtable, churchwarden, or other officer) *molliter manus impoſuit* to prevent ſuch diſturbance, is a good juſtification.

12. Mod. 610.
11. Mod. 64.
1. Ld. Ray. 62. 277.
1. Stra. 688.
1. Saund. 13.
1. Hawk. P. C. 271.

GLEVER brought an action of treſpaſs, of aſſault and battery, againſt *Elizabeth Hynde* and ſix others, For that they at *York-caſtle*, in the county of *York*, him, the ſaid plaintiff, with force and arms did aſſault, beat, and evil-entreat, to his damage of one hundred pounds.

The defendants plead to the *vi et armis*, not guilty; to the aſſault, beating, and evil-entreating, they ſay, that at ſuch a place, in the county of *Lancaſter*, one *Jackſon*, a curate, was performing the rites and funeral obſequies, according to the uſage of the church of *England*, over the body of ———, there lying dead, and ready to be buried; and that then and there the plaintiff did maliciouſly diſturb him; that they, the defendants, required him to deſiſt; and becauſe he would not, that they to remove him, and for the preventing of further diſturbance, *molliter ei manus impoſuerunt, &c. quæ eſt eadem tranſgreſſio*; ABSQUE HOC that they were guilty of any aſſault, &c. within the county of *York*, or any where elſe *extra comitatum Lancaſtriæ.*—The plaintiff demurs.

TURNER *for the plaintiff.* The defendants do not ſhew that they had any authority to lay hands on the plaintiff; as that they were *conſtables*, or *church-wardens*, or any *officers*; nor do they juſtify by the authority of any that were. If they had pleaded, that they laid hands on him to carry him before a juſtice of peace, perhaps it might have altered the caſe. The plaintiff here, if he be faulty, is liable to eccleſiaſtical cenſure; and the ſtatute of 1. *Philip & Mary*, c. 3. provides a remedy in ſuch caſes.

JONES *contra.* If the ſtatute of *Philip & Mary* did extend to this caſe, yet it does not reſtrain other ways that the law allows to puniſh the plaintiff, or keep him quiet. Our Saviour himſelf has given us a precedent; he whipped buyers and ſellers out of the Temple; which act of buying and ſelling was not ſo great an impiety, as to diſturb the worſhip of God in the very act and exerciſe of it.

THE

THE COURT. The ſtatute of 1. *Philip & Mary* concerns preachers only: but there is another act, made 1. *Eliz.* c. 2. ſ. 9. that extends to all men in orders that perform any part of the public ſervice. But neither of theſe ſtatutes take away the common law. And at the common law, any perſon there preſent might have *removed the plaintiff; for they were all concerned in the ſervice of God that was then performing; ſo that the plaintiff in diſturbing it, was a nuſance to them all; and might be removed by the ſame rule of law that allows a man to abate a nuſance.—Whereupon judgment was given for the defendant, *niſi cauſa, &c.*

GLEVER *againſt* HYNDE, AND OTHERS.

* [169]

See 6. Edw. 6. c. 4. the 1. Mary, c. 3. and the 1. Will. & Mary, c. 18. ſ. 19.

Anonymous.

Caſe 7.

ACTION UPON THE CASE. The plaintiff declares, That whereas the teſtator of the defendant was indebted to the plaintiff at the time of his death in the ſum of twelve pounds ten ſhillings; that the defendant, in conſideration of forbearance, promiſed to pay him five pounds at ſuch a time, and five pounds more at ſuch a time after, and the other fifty ſhillings when he ſhould have received money: then avers, that he did forbear, &c. and ſaith, that the defendant paid the two five pounds; but for the fifty ſhillings reſidue, that he hath received money, but hath not paid it. The defendant pleaded *non aſſumpſit*, which was found againſt him.

An *aſſumpſit* on a promiſe to pay fifty ſhillings *when he received money*, &c. ought to aver *how much* he received, and from *whom*, and *when*, and *where*, received; but on the *general iſſue* pleaded theſe defaults are aided by the verdict.

Ante, 43. 113. 166. Poſt. 284. Latch. 203. 2. Jones, 145. Cro. Car. 497. Carth. 130. 1. Sid. 423. 10. Mod. 254. 2. Ld. Ray. 838. 1217. 4. Bac. Abr. 24. notis. 2. Bl. Rep 820. Dougl. 658. 1. Ter. Rep. 543.

WILMOT moved in arreſt of judgment, That the plaintiff doth not ſet forth how much money the defendant had received, who perhaps had not received ſo much as fifty ſhillings: he ſaid, though the promiſe was general, yet the breach ought to be laid ſo, as to be adequate to the conſideration.—And SECONDLY, That the plaintiff ought to have ſet forth of whom the defendant received the money, and when, and where, becauſe the receipt was traverſable.

THE COURT agreed, That there was good cauſe to demur to the declaration: but after a verdict they would intend, that the defendant had received fifty ſhillings; becauſe elſe the jury would not have given ſo much in damages. And for the other exception, they held, That the defendant having taken the general iſſue, had waived the benefit thereof.

* Alford *againſt* Tatnell.

* [170]

Caſe 8.

GREGORY ALFORD and *Melchiſedec Alford* were bound, jointly and ſeverally, to *Tatnell* in a bond of ſeven hundred pounds. The obligee brought ſeveral actions; obtained two ſe-

If two joint and ſeveral obligors are outlawed; and one of them, being taken on the *capias utlagatum*, is ſuffered to eſcape; and the obligee obtain ſatisfaction in *debt* againſt the ſheriff for the eſcape; the other obligor on being taken may bring an *audita querela*, but he muſt ſhew the *time* when and *place* where ſatisfaction was made.—S. C. 2. Mod. 49. Ante, 111. 116. Poſt. 224. 1. Roll. Rep. 8. Hob. 2. Cro. Jac. 538. 12. Mod. 105. 598. 2. Bulſt. 97. Godb. 237. 2. Bl. Rep. 1050. 3. Bac. Abr. 699. Cromp. Prac. 422.

veral

ALFORD *against* TATNELL.

veral judgments in this court againſt the obligors; ſued both to an outlawry; and in *Michaelmas* Term, 18. *Car.* 2. both were returned outlawed. In *Hilary Term* following, *Gregory Alford* was taken upon a *capias utlagatum* by *Browne*, ſheriff of *Dorſetſhire*; who voluntarily ſuffered him to eſcape. *Tatnell* brought an action of *debt* upon this eſcape againſt *Brown*, and recovered, and received ſatisfaction; notwithſtanding which he proceeded to take *Melchiſedec Alford*, who brought an *audita querela*, and ſet forth all this matter in his declaration.—Upon a demurrer, the opinion of THE COURT was againſt the plaintiff for a fault in the declaration, *viz.* Becauſe the ſatisfaction made to the plaintiff by the ſheriff was not ſpecially pleaded, *viz.* time and place alledged where it was made; for it is iſſuable, and, for aught appears by the declaration, it was made after the writ of *audita querela* purchaſed, and before the declaration.

THE COURT ſaid, If *Tatnell* had only brought an action on *the caſe* againſt the ſheriff, and recovered damages for the eſcape, though he had had the damages paid, that would not have been ſufficient ground for the plaintiff here to bring an *audita querela*; but in this caſe he recovered his original debt in an action of *debt* grounded upon the eſcape, which is a ſufficient ground of action if he had declared well.—They gave day to ſhew cauſe, why the declaration ſhould not be amended, paying coſts.

Caſe 9.

Anonymous.

An officer may *juſtify* arreſting a man by virtue of *a capias* iſſued before *ſummons* out of a court in the county palatine of *Durham* deſcribed as "*an* ANCIENT "COURT *holden* "*before* THE "SHERIFF *of* "*the county, and* "*called* THE "COUNTY "COURT, &c. "&c." for although the proceedings are *irregular*, yet the court having power to iſſue *the writ*, the officer is bound to execute it.—Poſt. 272. 2. Saund. 182. 1. Stra. 509. 2. Ld. Ray. 1530.

FALSE IMPRISONMENT. The defendants juſtify by virtue of a warrant out of a court within the county-palatine of *Durham*. The plaintiff demurs.

* [171]

The material part of the plea was, That there was an ANCIENT COURT holden before the ſheriff of the county, &c. *called* THE * COUNTY-COURT, which was accuſtomed to be held from fifteen days to fifteen days; and that there was a cuſtom, upon a writ of *queſtus eſt nobis* iſſuing out of the county-palatine of *Durham*, and delivered to the ſheriff, &c. that, upon the plaintiff's affirming *quandam querelam* againſt ſuch perſon or perſons againſt whom the *queſtus eſt nobis* iſſued, the ſheriff uſed to make out a writ in the nature of a *capias ad ſatisfaciendum* againſt him or them, &c. that ſuch a writ of *queſtus eſt nobis* iſſued *ex curiâ cancellariæ Dunelm.* and was delivered to the ſheriff, who thereupon made *a precept* to his bailiffs to take the plaintiff, who thereupon was arreſted; which is the ſame impriſonment.

SERJEANT JONES, *for the plaintiff*, took exceptions to this plea: FIRST, The court is ill pleaded to be held before *the*

ſheriff,

ſheriff, for in a county-court *the ſuitors* are the judges *(a)*: and though this court hold plea upon a *queſtus eſt nobis*, which is the king's writ, yet that doth not alter the nature of the court, nor its juriſdiction *(b)*. ANONYMOUS.

SECONDLY, The cuſtom of holding this court *de quindecim diebus in quindecim dies* is void; being not only againſt MAGNA CHARTA, c. 35. but againſt the 2. & 3. *Edw.* 6. c. 25. which enacts, "that no county-court, &c. ſhall be longer deferred than "*one month* from court to court, &c. any uſage, cuſtom, ſta-"tute, or law to the contrary notwithſtanding."

THIRDLY, He took theſe exceptions to the cuſtom: 1ſt, It is abſurd, that if upon a *queſtus eſt nobis* the party affirm *quandam querelam*, that then, &c.; for a *queſtus eſt nobis* is an action upon the caſe, and this *quædam querela* may be in any other action, though never ſo remote: the plaint ought to be in purſuance of the writ, and ſo to have been pleaded. 2dly, As this cuſtom is laid, it does not appear that the plaint ought to ariſe within the juriſdiction of the court. 3dly, It is againſt the law, that in any inferior court *a capias* ſhould be awarded before *ſummons (c)*.

FOURTHLY, Exception to the declaration was, That it does not appear, Whether this writ were purchaſed out of the chancery of the city of *Durham*, or of that of the county? The words "*ex cur. cancellar. Dunelm.*" are applicable to either.

FIFTHLY, Here is not *an averment*, that the cauſe of action did ariſe within the county-palatine: it is ſaid indeed, that he was indebted, and did aſſume within the county; but it is the contract and cauſe of the debt that entitles the court * there to the action. * [172]

SIXTHLY, He ſays, that he did *levare quandam querelam*, but does not ſay that it was *ſuper brevi de queſtus eſt nobis*; nor that it was *in placito prædict.* nor makes any application at all of the plaint to the writ; and then the plaint not appearing to be warranted by the writ, and being for above forty ſhillings, the proceedings are *coram non judice.*

SEVENTHLY, The ſheriff's warrant is to arreſt the party, *ſi inventus fuerit in ballivâ tuâ*; and it does not appear that the bailiff hath any bailiwick. If the county were divided into ſeveral diviſions, and each bailiff allotted to a ſeveral diviſion, this ought to have been ſhewn, and that the place where this arreſt was made was within the bailiff's proper diviſion.

EIGHTHLY, On the defendant's own ſhewing, the court was not held according to the cuſtom alledged, VIZ. *de quindecim diebus in quindecim dies*; for the laſt court is ſaid to have been held the 12*th of March*, and the next after that on the 26*th March*.

(a) Cro. Jac. 582.
(b) Jentleman's Caſe, 6. Co. 11, re.
(c) 1 Roll. 563. 2. Roll. 277. 12. Mod. 598. 4. Ld. Rev. 1710.

TURNER,

EASTER TERM,

The Twenty-Sixth of Charles the Second,

IN

The Common Pleas.

Sir John Vaughan, *Chief Juſtice.*

Sir Robert Atkins, *Knt.*
Sir Hugh Wyndham, *Knt.*
Sir William Ellis, *Knt.*
} *Juſtices.*

Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

Caſe 10.

On *plene adminiſtravit* the defendant may give in evidence, that he was adminiſtrator *durante minore ætate*, and hath paid ſuch debts, and delivered over the reſidue.

Hob. 250. Ray. 483. 3 Leon. 103. 1. Sid. 57. Latch. 160. Cro. Eliz. 43.

* Brooking *againſt* Jennings and Others.

THE plaintiff declared as executor againſt the defendants as executors alſo. The defendants pleaded ſeverally "*plenè adminiſtravit.*" Upon one of the iſſues a ſpecial verdict was found, *viz.* That the ſaid defendant being executor *durante minore ætate* of an infant, had paid ſuch and ſuch debts and legacies, and had delivered over *totum reſiduum ſtatûs perſonalis* of the teſtator to the infant executor, when he came of age.

ATKINS, *Juſtice.* This ſpecial verdict does not maintain the defendant's plea of "*fully adminiſtered*;" for that cannot be pleaded, unleſs all debts, &c. are diſcharged, as far as the *aſſets* will reach: which is not done here; for *reſiduum ſtatûs perſonalis* is delivered over, &c. and that *reſiduum* is liable to the payment of this debt, which is yet undiſcharged.

But VAUGHAN, *Chief Juſtice*, WYNDHAM and ELLIS, *Juſtices*, held, That however an executor diſchargeth himſelf of the eſtate that was the teſtator's, he may plead "*fully adminiſtered:*" and that it is his ſafeſt plea.

It was found by the ſame verdict, that the teſtator left a perſonal eſtate, to the value of two thouſand pounds; that there were owing by him five hundred pounds, in debts upon ſpecialties; five hundred pounds more, upon ſimple contracts; and that he had diſpoſed of four hundred pounds in legacies: and that this defendant was executor *durante minore ætate* of the teſtator's ſon; and that he had paid fourteen hundred pounds in diſcharge of the debts and legacies aforeſaid; and had accounted with the infant executor, when he came of age; and that upon the payment of ninety-one pounds to him, the infant executor releaſed to him all actions, &c. and, Whether, upon this whole matter, this defendant ſhould be ſaid to have adminiſtered? was the queſtion.

An executorſhip *durante minore ætate* ceaſes on the infant's coming to the age of ſeventeen years. 5. Co. 29. Wentw. 307. Cro. Eliz. 602. Cro. Car. 240. 2. Sid. 60. 1. Leon. 74. 3. Peer. Wms. 79.

1. Ld. Ray. 338. 408. 5. Mod. 395. 12. Mod. 194.

VAUGHAN, *Chief Juſtice.* When an infant executor comes of age, the power of an executor *durante minore ætate* ceaſeth; and the * new executor is then liable to all actions: if the former executor waſted, the new one hath his remedy againſt him; but he is not liable to other men's ſuits (*a*). Nor is there any inconvenience in this; for ſtill here is a perſon liable to all actions. It is objected, that poſſibly the new executor is not of ability to ſatisfy. I anſwer, If in ſome particular caſe it fall out to be ſo, that is by accident: and to argue from the poſſibility of ſuch an accident, is to ſuppoſe the law fitted to anſwer all emergencies. —ATKYNS, *Juſtice*, accorded.

* [175]

An adminiſtrator *durante minore ætate* is not liable to other men's actions after his power is expired; but if he has *waſted* the goods, the executor has remedy againſt him.—Cro. Eliz. (459). 34. Hen. 6. pl. 14. Dyer, 339. Cro. Eliz. 43. 6. Co. 18. Latch. 60. 3. Term Rep. 587.

VAUGHAN, *Chief Juſtice.* It is ſaid, That here are fifteen hundred pounds liable to pay this debt: for to pay debts upon ſimple contracts or legacies before it, is *a devaſtavit*; eſpecially the defendant having notice of this debt (which was alſo found). That is a miſtake, upon which ſome books run: but it is certainly not law. Debts upon *ſimple contracts* may be paid before *bonds*, unleſs the executors have timely notice given them of thoſe bonds; and that notice muſt be by action.—ATKINS and ELLIS agreed with VAUGHAN: WYNDHAM *dubitabat.*

An executor may pay *ſimple contract debts* before *ſpecialties*, unleſs he has timely notice thereof by action. Cro. Eliz. 41. 3. Mod. 115. Fitzg. 76. Bull. N P. 178. Dougl. 436. 1. Term Rep. 690.

The caſe was put off to be argued next Trinity Term: but in the mean time the plaintiff diſcontinued.

(*a*) *Sed quære*; for it was determined in *Packman's Caſe*, that if an adminiſtrator *waſte* the goods, and afterwards adminiſtration is committed to another, yet any *debtee* ſhall charge him in debt; and if he plead the laſt adminiſtration committed to another, the other may reply, that before the ſecond adminiſtration committed he had waſted the goods, 6. Co. 18.; and it is ſaid Bull. N. P. 145. that this ſeems the moſt reaſonable determination. See alſo Latch. 160. 268. Cro. Car. 88. Hob. 49. 266.

Caſe 11.

Scudamore *againſt* Croſſing.

Trinity Term, 22. Car. 2. Roll 871:

In the Exchequer Chamber.

If a man ſeiſed in fee "give "and grant, "bargain and "ſell, alien, "enfeoff, and "confirm," certain lands to his *daughter*, in conſideration of *blood* and *marriage*, he thereby raiſes *a uſe* by way of *covenant to ſtand ſeiſed*.
S. C. 2. Lev. 9.
S.C.1.Vent.137.
S. C. 2. Keb. 754. 784.

EJECTMENT. ON A SPECIAL VERDICT, it was found, That a man by deed did give and grant, bargain and ſell, alien, enfeoff, and confirm to his daughter certain lands; but no conſideration of *money* is mentioned, nor is the deed enrolled: there is likewiſe no conſideration of *natural affection* expreſſed other than what is implied in naming the grantee *his daughter*: there is no livery indorſed, nor any found to have been made; nor was the daughter in poſſeſſion at the time of the deed made.

The queſtion was, Whether this were a void deed, or had any operation at all in the law, and what was wrought by it?

In the king's bench it was adjudged by THE WHOLE COURT to be a good deed, and that it carried the eſtate to the daughter by way of *covenant to ſtand ſeiſed* (*a*).

Upon a writ of error before the juſtices of the common pleas and the barons of the exchequer, the caſe was argued at Serjeants-Inn, by SIR WILLIAM JONES againſt the deed, and * by SIR FRANCIS WINNINGTON in maintenance of it.

*[176]

Ante, 91. 121. 159.
2. Lev. 75.
1. Vent. 372.
2. Rol. Abr. 786.
2. Mod. 207.
9. Mod. 162. 176.
11. Mod. 96. 152. 181. 196. 210.
12. Mod. 38. 201. 160.
Fitzg. 301.
1. Ld. Ray. 290.
2. Ld. Ray. 799. 801. 854. 876.
2. Pr. Wms. 139.

JONES. Before the ſtatute of uſes, 27. *Hen.* 8. c. 10. a man might either have retained *the poſſeſſion*, and have departed with *the uſe*, or he might have departed with *the poſſeſſion*, and have retained *the uſe*; or he might have departed with them both together. The ſtatute unites *the poſſeſſion* to *the uſe*; but leaves men at liberty to convey their eſtates by putting the poſſeſſion out of themſelves, and limiting an uſe; or by raiſing an uſe, and letting the poſſeſſion follow that. Now how ſhall it be known when an eſtate muſt paſs one of theſe ways, and when the other? That muſt appear by the intention of the party expreſſed in the deed. Some conveyances contain words that look both ways; ſome one way, and ſome another. If the words look both ways, then has he to whom the eſtate is intended to be conveyed, election to take it whichever way he likes beſt. A man in conſideration of money granted, enfeoffed, bargained, and ſold; and in the deed there was

(*a*) The caſe upon which the Court gave judgment is ſtated to be as follows: *Nicholas Hooke* was ſeiſed in fee; and in conſideration of affection to his daughter made a deed to his daughter, inrolled within ſix months, whereby, in conſideration of affection, and for her portion and preferment, and other valuable conſiderations, he bargained, ſold, aliened, enfeoffed, and confirmed, to the ſaid daughter the lands in queſtion, with a clauſe of warranty, and a covenant for further aſſurance; and that the indenture was made for the conſideration aforeſaid, and no other. S. C. 2. Lev. 9. And in two other reports of S. C. the deed is ſtated to be "for and in conſideration of natural love, augmentation of her portion, and preferment of her in marriage, and other good and valuable conſideration." S. C. 1. Vent. 137. S. C. 2. Keb. 784. See alſo Mr. Hargrave's note (1) Co. Lit. 49. a.; Melbourn v. Simpſon, 2. Wilſ. 22.; Wilkinſon v. Tranmer, 2. Wilſ. 75.

a letter

a letter of attorney to make livery; and it was reſolved to be a good conveyance by way of bargain and ſale, if the deed were enrolled (*a*). Where the words are only proper to paſs an eſtate by way of uſe, there you ſhall never take an eſtate at common-law: *Cro. Jac.* 210. In the caſe of *Adams v. Steer* (*b*), the caſe of *Denton v. Fettyplace* is there cited, that by the words of bargain and ſale without attornment, a reverſion paſſeth not (*c*). If the king bargain and ſell, &c. no uſe can ariſe, becauſe the king cannot ſtand ſeiſed to an uſe (*d*). On the other ſide, where the words are proper to paſs the eſtate at common law, there nothing ſhall paſs by way of uſe. A *quære* is made in *Dyer* (*e*), Whether or no, if a man, in conſideration of mutual affection, &c. releaſe to his brother, who is not in poſſeſſion, an uſe thereby ariſeth to the releſſee? but this *quære* is reſolved in a manuſcript report that I have of that caſe, *viz.* That no uſe does ariſe. The caſe of *Ward v. Lambert* (*f*), and of *Oſburn v. Churchman* (*g*), is the caſe in queſtion. In *Roll*'s Second Part (*h*), a man in conſideration of marriage did give and grant to his wife, after his deceaſe, to her and the heirs of her body, &c. and it was reſolved, that nothing paſſed. This caſe is much ſtronger than ours: for there is but one way to make this good, *viz.* by raiſing an * uſe: for as a conveyance at common law, it cannot be good, becauſe a freehold cannot be granted to commence *in futuro*; and yet rather than recede from the words of the party, the deed was adjudged to be void. He cited *Foſter v. Foſter*, *Trinity Term* 1659 (*i*), which himſelf had argued. In the deed here in queſtion there are words proper to paſs an eſtate in poſſeſſion, "give and grant." There is likewiſe a clauſe of warranty, of which the grantee ſhould loſe the benefit in a great meaſure, if he were *in the poſt*; for then he ſhall not *vouch*: and there are opinions that he cannot *rebut*; as in *Spirt v. Bence* (*k*). There is alſo a covenant, that after the ſealing and delivery, and due execution of, &c. the party ſhall quietly enjoy, &c. Now what execution can be meant but by livery and ſeiſin? *Foxe's Caſe* (*l*) has been objected; in which it is reſolved, that the reverſion in that caſe ſhould paſs by way of bargain and ſale, though the words of the grant were, "demiſe, "ſet, and to farm let;" all words proper to a common-law conveyance. I anſwer, The conſideration of money there expreſſed is ſo ſtrong a conſideration as to carry it that way; but the conſideration of natural affection is not ſo ſtrong; and ſo the caſes are not alike. The conſideration of money has been held ſo ſtrong as to carry an eſtate of fee-ſimple in an uſe without words of inheritance.

* [177]

(*a*) Heyward's Caſe, 2. Co. 35. a. to 37. b. Adams v. Steer, Cro. Jac. 210. 2. Roll. 786. pl. 25.
(*b*) Cro. Jac. 210.
(*c*) Vide Cro. Jac. 50. Dr. Atkyn's Caſe.
(*d*) Moor, 113.
(*e*) Dyer, 302. b.
(*f*) Cro. Eliz. 394. 397.
(*g*) Cro. Jac. 127.
(*b*) 2. Roll.
(*i*) Finch Ch. Rep. 170. 1. Lev. 55. 1. Sid. 82. Ray. 43. 1. Keb. 160. 225. 274. 319.
(*k*) Cro. Car. 368. Stiles, 308.
(*l*) 5. Co. 94. 2. Brownl. 291.

SCUDAMORE *againſt* CROSSING.

WINNINGTON, *contra*. He inſiſted upon the intention of the party, the conſideration of blood and natural affection, and the neceſſity of making this deed good by way of covenant to ſtand ſeiſed, becauſe it could not take effect any other way. The clauſe of warranty and covenant for quiet enjoyment, he ſaid, were but forms of conveyances, and words of clerks; but the effectual words are thoſe that contain the inducement of the party to make the conveyance, and the words that paſs the eſtate *(a)*. In *Foſter's Caſe*, which had been cited againſt him, he ſaid, the deed was as unformal to paſs the eſtate one way as another. In *Oſburn v. Churchman (b)*, he ſaid, this point was ſtarted; but that the reſolution was not upon this point: it came in queſtion neither upon a ſpecial verdict nor a demurrer. *Tibs v. Purplewell (c)* anſwers all objections againſt our caſe, and is in form and ſubſtance the ſame with it. He cited a caſe of *Saunders v. Savin (d)*, adjudged in the * late times in the common pleas, *viz.* that where a man ſeiſed in fee of a rent-charge granted it to a kinſman for life, and the grantor died before attornment, it was reſolved, that upon the ſealing and delivery of the deed an uſe aroſe. Wherefore he prayed, that the judgment might be affirmed.

* [178]

TURNER, *Chief Baron* of the Exchequer, TURNER and LITTLETON, *Barons*, and ATKINS, WYNDHAM, and ELLIS, *Juſtices* of the Court of Common Pleas, were for affirming the judgment.—VAUGHAN, *Chief Juſtice* of the Common Pleas, and THURLAND, *Puiſne Baron*, againſt it.

1. Sid. 26.
2. Vent. 140.
1. Keb. 162. 275.

The SIX JUDGES argued, FIRST, That in a covenant to ſtand ſeiſed, thoſe words of "covenanting to ſtand ſeiſed to the uſe "of," &c. are not abſolutely neceſſary; and that it is ſufficient if there are words that are tantamount.—SECONDLY, That no conveyance admits of ſuch variety of words as does this of a covenant to ſtand ſeiſed.—THIRDLY, That Judges have always endeavoured to ſupport deeds, *ut res magis valeat quàm pereat.*—FOURTHLY, That the grantor in this caſe, by putting in plenty of words, ſhews, that he did not intend to tie himſelf up to any ſort of conveyance.—FIFTHLY, That if the words "give and grant" had been alone in the deed, there would have been no queſtion; and that if ſo, then *utile per inutile non vitiatur.*—SIXTHLY, That every man's deed muſt be taken moſt ſtrongly againſt himſelf.—SEVENTHLY, That the words "give and grant" enure ſometimes as *a grant*, ſometimes as *a covenant*, ſometimes as *a releaſe*; and muſt be taken in that ſenſe which will beſt ſupport the intent of the party.—EIGHTHLY, That the very point of this caſe has received two full determinations upon debate; and that it were a thing of ill conſequence to admit of ſo great an uncertainty in the law as now to alter it.—NINTHLY, That there is here a clear intent that the daughter ſhould have this eſtate—

Raym. 48.

(*a*) Plowd. Queries, 305. 2. Roll. Abr. 787. pl. 25. Co. Lit. 49. Poph. 49.
(*b*) Cro. Jac. 127.
(*c*) 2. Roll. Abr. 786.
(*d*) Raym. 48. 2. Lev. 213.

a deed;

a deed; a good conſideration to raiſe an uſe; and words that are tantamount to a covenant to ſtand ſeiſed. Wherefore the judgment was affirmed.

SCUDAMORE *againſt* CROSSING.

THURLAND, *Puiſne Baron*, ſaid, The intention of the party was not a ſure rule to conſtrue deeds by: that if lands were given *in connubio ſoluto ab omni ſervitio*, the intent of the giver is, to make a gift in *frank-marriage*; but the common law, that delights in certainty, will not underſtand his words ſo, becauſe he does not ſay *in libero maritagio*. In our caſe, the * firſt intent of the father was to ſettle the land upon his daughter; his ſecond intent was to do it by ſuch or ſuch a conveyance: what conveyance he meant to do it by, we muſt know by his words. The words "give and grant" do generally and naturally work upon ſomething *in eſſe*: ſtrained conſtructions are not favoured in the law: nor ought heirs to be diſinherited by forced and ſtrained conſtructions. If this deed ſhall work as a covenant to ſtand ſeiſed, it will be in vain to ſtudy forms of conveyances; it is but throwing in words enough, and if the lands paſs not one way, they will another. He cited *Blitheman v. Blitheman (a)*, and *Dyer* 55.; and ſaid *Pitfield v. Pierce (b)* was later than that of *Tibs v. Purplewell (c)*, and of better authority.

* [179]

VAUGHAN, *Chief Juſtice*, *accordant*. It is not clear that the words "give and grant" are ſufficient to raiſe a uſe; but ſuppoſing that they are by a forced expoſition, when nothing appears to the contrary, will it thence follow, that they may be taken in a ſenſe directly contrary to their proper and genuine ſenſe, in ſuch a place as this, where all the other parts of the deed are wholly inconſiſtent with, and will not by any poſſibility admit of ſuch a conſtruction? He mentioned ſeveral clauſes in the deed, which, he ſaid, were proper only to a conveyance at common law. He appealed to the law before the ſtatute of uſes; and ſaid, that where a uſe would not ariſe by the common law, there the ſtatute executes no poſſeſſion; and that by ſuch a deed as this, no uſe would have ariſen at the common law.—But the judgment was affirmed (*d*).

1. Sid. 26.

(*a*) Cro. Eliz. 279. 1. And. 294. 2. Co. 52.

(*b*) 2. Roll. Abr. 789. March. 50.

(*c*) 2. Roll. Abr. 786.

(*d*) See the caſe of Garniſh v. Wentworth, Carter, 137. 2. Vent. 150. Moor, 35. 1. Leon. 25. 2. Roll. Abr. 786. And ſee an Eſſay on Uſes and Truſts by F. W. Sanders, p. 556.

Gabriel Miles's Caſe.

Caſe 12.

GABRIEL MILES and his wife recovered in an action of debt againſt one *Cogan* two hundred pounds, and ſeventy pounds damages: the wife died, and the huſband prayed to have execution

If huſband and wife recover in debt, and the wife die, the huſband may take out execution on the judgment without *ſcire facias*.—Co. Lit. 351. 3. Lev. 403. 3. Mod. 189. 1. Sid. 337. Cro. Car. 464. 10. Mod. 164. 246. 12. Mod. 346. 383. Gilb. Eq. Rep. 70. 84. Fitzg. 143. 205. 1. Vern. 396. 1. Ld. Ray. 244. 2. Ld. Ray. 1050. 3. Peer. Wms. 378. 1. Wilſ. 302. Dougl. 637. H. Bl. Rep. 109.

GABRIEL MILES's CASE.

upon this judgment. THE COURT, upon the firſt motion, inclined that it ſhould not ſurvive to the huſband; but that adminiſtration ought to be committed of it, as a *thing in action*: but this Term they agreed, that the huſband might take out execution; and that by the judgment * it became his own debt, due to him in his own right. And accordingly he took out a *ſcire facias*; and the caſe of *Beaumond v. Long*, *Cro. Car.* 208. 227. was cited.

* [180]

Caſe 13.

Anonymous.

A leaſe made the 10th day of *October*, *habendum* from the 20th day of *November*, for five years, is void for uncertainty.

Cro. Eliz. 773. 890. Cro. Jac. 166. 6. Co. 36. Gilb. Eq. Rep. 143. 235. 1. Stra. 651. 1. Ld. Ray. 737. Sheph. Touch. 205. 275. 2. Bl. Com. Bac. Abr. "Leaſes" (L). Com. Dig. "Eſtates" (G 8.). Run. Eject. 96.

EJECTMENT. The plaintiff declared upon a leaſe made the tenth day of *October*, *habendum* from the twentieth day of *November*, for five years. And the queſtion, upon a ſpecial verdict, was, Whether this were a good or a void leaſe?

JONES, *Serjeant*. There are many caſes in which the law rejects the limitation of the commencement of a leaſe, if it be impoſſible; as from the thirty-firſt of *September*, or the like: now this being altogether uncertain, and ſince there is nothing to determine your judgments what "*November*" he meant, whether laſt-paſt, or next-enſuing, it amounts to an impoſſible limitation: as in the *Biſhop of Bath's Caſe* (*a*), in *Dorſet's Caſe* (*b*), and in the caſe of *Elmes v. Leaves* (*c*).

BALDWIN, *contra*. The law will reject an impoſſible limitation, but not an uncertain limitation.

VAUGHAN, *Chief Juſtice*, and ATKINS, *Juſtice*. The law rejects an impoſſible limitation, becauſe it cannot be any part of the parties agreement: but an uncertain limitation vitiates the leaſe, becauſe it was part of the agreement; but we cannot determine it, not knowing how the contract was. There are many examples of leaſes being void for uncertainty of commencements; which could not have been adjudged void, if the limitation in this caſe were good.

WYNDHAM and ELLIS, *contra*; and that it ſhould begin from the time of the delivery.

It was moved afterwards, and, ELLIS *being abſent*, it was ruled by VAUGHAN and ATKINS againſt WYNDHAM's opinion, and the judgment was arreſted.

(*a*) 1. Roll. Abr. 849. Co. Lit. 45. b. 6. Co. 35.
(*b*) 1. Roll. Abr. 849. pl. 7. Cro. Eliz. 512. 2. Roll. Abr. 193. 211. Moor, 417.
(*c*) 3. Danv. Abr. 212. p. 10.

Fowle

* Fowle *againſt* Doble.

Caſe 14.

FORMEDON *in the remainder.* The caſe was thus: There were three ſiſters: the eldeſt was tenant *in tail* of a fourth part of one hundred and forty acres, &c. in three vills, *A. B.* and *C.* the remainder in fee-ſimple to the other two: the tenant in tail takes huſband *Dr. Doble* the defendant. The huſband and wife levy A FINE *ſur conuſance de droit*, to the uſe of them two, and the heirs of the body of his wife, the remainder in fee to the right heirs of the huſband: and this fine was with warranty againſt them and the heirs of the wife. The wife dies without iſſue, living the huſband, againſt whom *Lucy* and *Ruth*, the other two ſiſters, to whom the remainder in fee was limited, bring a FORMEDON *in the remainder.* The defendant, as to part of the lands in demand, *viz.* one hundred acres, pleaded "*non tenure*," and that ſuch a one was tenant. To that plea the plaintiff demurred. As to the reſt of the lands, he pleaded this fine with warranty. The plaintiffs made a frivolous replication, to which the defendant demurred. The plaintiff's counſel excepted to the defendant's plea of *non tenure*,

On *non-tenure* pleaded for one hundred acres to a *formedon in remainder* for one hundred and forty acres lying in three vills, the tenant need not ſet forth in which of the vills the hundred acres lie; but he muſt ſtate who was tenant on the day of ſuing out the *original writ.*

S.C. 3. Keb. 186. S. C. 1. Freem. 125. 157. S. C. Carter, 239. 241. Poſt. 218. 250. Theolal. Dig. b. 11. c. 22. ſ. 4. 2. Danv. 570. N. Lut. 258. 306. Cro. Eliz. 233. Savil, 126. 3. Lev. 330. 10. Mod. 3. 142. 11. Mod. 103. 12. Mod. 512. 1. Ld. Ray. 229. 476. 2. Bac. Ab. 592. 4. Bac. Ab. 105. Bar. Notes, 332. 1. Com. Dig. "Abatement" (F. 14.).

FIRST, That he does not expreſs in which of the vills the one hundred acres lie (*a*).—But this was over-ruled; for the *formedon* being of ſo many ſeveral acres, he is not obliged to ſhew where thoſe lie that he pleads "*non tenure*" of: he tells the plaintiff who is the tenant, which is enough for him.

SECONDLY, Becauſe he that pleads "*non tenure*" in abatement, ought to ſet forth who was tenant *die impetrationis brevis orig. &c.* —But this was over-ruled alſo; for he ſays, that himſelf was not tenant *die impetrationis brevis origin.* but that ſuch another *eodem die* was tenant; which is certain enough. When the tenant pleads *non-tenure* to the whole, he need not ſet forth who is tenant; otherwiſe when he pleads *non-tenure* of part (*b*). At the common law, if the tenant had pleaded *non-tenure* as to part, it would have abated all the writ (*c*): but by the ſtatute of the 25. *Edw.* 3. c. 16. it is enacted, "that by the exception of *non-*"*tenure* of parcel, no writ ſhall be abated, but only for that parcel "whereof the *non-tenure* is alledged."

* [182]

A THIRD EXCEPTION was taken to the pleading of the * fine, *viz.* Becauſe he pleaded a fine levied of a fourth part, without ſaying in how many parts to be divided.—This was alſo over-ruled, and *Charnock v. Worſley* (*d*) was cited, where a difference is taken betwixt *a writ* and *a fine*; and in a fine it is ſaid to be good, that being but a common aſſurance; *aliter* in a writ (*e*). This exception ſeems levelled againſt the plaintiff's own writ, in which he demands a fourth part, without ſaying in how many parts to be divided.

In a *formedon*, the tenant may plead a fine levied of a fourth part of the term, without ſhewing in how many parts it was divided.

(*a*) See the YEAR BOOK 5. Edw. 3. pl. 140. 184. and Sir John Stanley's Caſe, 33. Hen. 6. pl. 51.

(*b*) See YEAR-BOOKS 11. Hen. 4. pl. 15. 33. Hen. 6. pl. 51.

(*c*) 36. Hen. 6. pl. 6.

(*d*) 1. Leon. 114.

(*e*) Year-Book 19. Edw. 3. pl. Fitz. Abr. 244.

THE

A woman being tenant in tail, with remainder in fee to her ſiſter, marries. The huſband and wife levy a fine to the uſe of themſelves, and the heirs of the body of the wife, with remainder in fee to the right heirs of the huſband, with a *warranty* againſt them and the heirs of the wife.

THE MATTER IN LAW was, Whether or no this warranty, being againſt the huſband and wife, and the heirs of the wife, were a bar to the plaintiffs, or ſurvived to the huſband?—And IT WAS RESOLVED to be a bar; for this warranty as to the huſband, was deſtroyed as ſoon as it was created: the ſame breath that created it put an end to it: for the huſband warranted during his own life only, and took back as large an eſtate as he warranted (*a*); which deſtroys his warranty. And this is LITTLETON's text: If a man make a feoffment in fee with warranty, and take back an eſtate in fee, the warranty is gone. But the deſtruction of the huſband's warranty does not affect the wife's (*b*): and *Sym's Caſe* (*c*) was cited, upon which ELLIS ſaid he much relied, and contended that *Herbert's Caſe* (*d*) can give no rule here; for that here the huſband is ſeiſed only in right of the wife.

The huſband, on the death of his wife without iſſue, may plead this fine and warranty in bar of her ſiſter's remainder in fee; for the warranty being merely nominal as to the huſband did not ſurvive as to him, but deſcended upon the ſiſter, as collateral heir to his wife.

8. Co. 51, 52, &c. Cro. Jac. 217, 218. Bro. "Garranty," 14. Co. Lit. 373. b. Caſes Temp. Talb. 237.

VAUGHAN ſaid, FIRST, That if the fine in this caſe had been levied to a ſtranger for life, or in fee, who had been impleaded by another ſtranger; that in that caſe the tenant ought to have vouched the ſurviving huſband, as well as the heir of the wife, or elſe he would have loſt his warranty.—SECONDLY, he ſaid, If the fine had been levied to the uſe of a ſtranger, who had been impleaded by the heirs of the wife, he queſtioned, Whether or no the tenant could have rebutted them for any more than a moiety? And he queſtioned the reſolution of *Sym's Caſe*. There is a caſe cited in *Sym's Caſe* out of the *Year Book* 45. *Edw.* 3. pl. 23. which is expreſsly againſt the reſolution of the caſe. It is ſaid in THE REPORTS (*e*), That no judgment was given in that caſe, which is falſe; and that the caſe is not well abridged by BROOK (*f*), which is alſo falſe. If in caſe of a voucher a man loſeth his warranty, that does not vouch all that are bound; why ſhould not one that is rebutted have the like advantage? There is a reſolution quoted in *Sym's Caſe*, out of the YEAR BOOK 5. *Edw.* 2. *Fitz. tit.* "*Garranty*," 78. upon which the judgment is ſaid to be founded, being, as is there ſaid, a caſe in point; but he conceived not: for HARVEY, that gave the rule, * ſaid, "*Le tenant poit barrer vous touts, ergo un ſole.*" In the caſe there were ſeveral co-heirs, and if all were demandants, all might have been barred; and if one be demandant, there is no queſtion but ſhe may be rebutted for her part. But *Sym's Caſe* is quite otherwiſe: for there one perſon is coheir to the guaranty, that is not heir to any part of the land. In the YEAR BOOK 6. *Edw.* 3. *pl.* 50. there is a caſe reſolved upon the ground and reaſon of the 45. *Edw.* 3. For theſe reaſons, he ſaid, he could not rely upon *Sym's Caſe*. He agreed with the reſt as to the rea-

* [183]

(*a*) See Spirt v. Bence, Cro. Car, 370.
(*b*) Year-Book 20. Hen. 7. pl. 1.
(*c*) 8. Co. 51. Cro. Eliz. 33.
(*d*) 3. Co. 11.
(*e*) 8. Co. 52.
(*f*) Brook, "Garranty" 14.

ſon

ſon why the warranty is deſtroyed, *viz.* Becauſe the huſband takes back as great an eſtate as he warranted; for then no uſe can be made of the warranty. If a man have land, and another warrant this land to one and his heirs, and one of them die without heirs, the ſurvivor may be vouched without queſtion. The huſband never was obliged by this warranty; but as to him it was merely nominal; for from the very creation of it, it was impoſſible that it ſhould be effectual to any purpoſe: he cited *Rolls v. Oſborn* (*a*).

FOWLE *againſt* DOBLE.

THE WHOLE COURT agreeing in this opinion, judgment was given for the tenant (*b*).

(*a*) 1. Brownl. 90. 2. Brownl. 169. Hob. 20. Moor, 859. 4. Leon. 250. Winch's Ent. 1127.

(*b*) See the 4. Ann. c. 16. ſ. 21. and the caſe of Williamſon v. Hancock, poſt. 193. and the caſes there cited.

TRINITY

TRINITY TERM,

The Twenty-Sixth of Charles the Second,

IN

The Common Pleas.

Sir John Vaughan, *Knt. Chief Juſtice.*

Sir Robert Atkins, *Knt.*
Sir Hugh Wyndham, *Knt.*
Sir William Ellis, *Knt.*
} *Juſtices.*

Sir William Jones, *Knt. Attorney General.*

Sir Francis Winnington, *Knt. Solicitor General.*

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* [184]

Caſe 15.

* Hamond *againſt* Howell, Recorder of London.

An action will not lie againſt a Judge for a wrongful commitment, any more than for an erroneous judgment.

S. C. ante, 119. S. C. 2. Mod. 218. S. C. 2. Jones, 73. S. C. Vaugh. 135. S. C. 3. Keb. 322. S. C. Freem. r. Ante, 185. Allen, 12 1. Sid. 273. 338. 4. Inſt. 3-4. 12. Mod. 388. 392. 566. 1. Ld. Ray. 263. 468. 2. Ld. Ray, 767. 2. Wilſ, 155. 3. Bl. Rep. 1145.

THE PLAINTIFF brought an action of *falſe impriſonment* againſt the *mayor of London*, the recorder, and the whole court at the OLD BAILEY, and the ſheriffs and gaoler, for committing him to priſon at a ſeſſions there held.

The caſe was thus: Some quakers were indicted for a riot, and the Court directed the jury, if they believed the evidence, to find the priſoners guilty; for that the fact ſworn againſt them was in law a riot: which becauſe they refuſed to do, and gave their verdict againſt the direction of the Court in matter of law, they committed them. They were afterwards diſcharged upon a *habeas corpus*. And one of them brings this action for the wrongful commitment.

MAYNARD, *Serjeant*, moved for the defendants, That they might have longer time to plead; for a rule had been made, that the defendants ſhould plead the firſt day of this Term.

THE COURT declared their opinions againſt the action, *viz.* That no action will lie againſt a Judge for a wrongful commitment, any more than for an erroneous judgment.

MONDAY,

MONDAY, *the Secondary*, told the Court, that giving the defendants *time to plead* countenanced the action, but granting *imparlances* did not. So they had a ſpecial imparlance till *Michaelmas Term* next.

HAMOND *againſt* HOWELL. 2. Term Rep. 493.

ATKINS, *Juſtice*. It was never imagined, that Juſtices of *oyer* and *terminer* and gaol-delivery would be queſtioned in private actions for what they ſhould do in execution of their office: if the law had been taken ſo, the ſtatute of 7. *Jac.* c. 5. for pleading the *general iſſue* (*a*) would have included them as well as inferior officers.

(*a*) See alſo 24. Geo. 2. c. 44. and 2. Hawk. P. C. ch. 8. ſ. 42.

* Birch *againſt* Lake.

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Caſe 16.

A PROHIBITION was granted to the ſpiritual court upon this ſuggeſtion: That SIR EDWARD LAKE, *vicar-general*, had cited the plaintiff *ex officio* to appear and anſwer to divers articles. THE COURT ſaid, that the citation *ex officio* was in uſe, when the oath *ex officio* was on foot: but that is ouſted by the 17. *Eliz.* c. (*a*). If citations *ex officio* were allowed, they might cite whole counties without preſentment; which would become a trick to get money. And the party grieved can have no action againſt the vicar-general, being a Judge, and having juriſdiction of the cauſe, though he miſtake his power. *Per quod, &c.*

Prohibition will lie to the ſpiritual court againſt a citation *ex officio* to anſwer articles. Ante, 119. 184. 10. Mod. 349. 1. Ld. Ray. 263. 468. 2. Ld. Ray. 767.

(*a*) See alſo 16. Car. 1. c. 11. and 13. Car. 2. ſt. 1. c. 12. 3. Bl. Com. 101. 447.

Prattle *againſt* King.

Caſe 17.

HUSBAND and Wife, adminiſtrators in the right of the wife, bring an action of debt againſt huſband and wife, adminiſtrators likewiſe in the right of the wife, *de bonis non, &c.* of *J. S.* The action is for rent incurred in the defendants own time, and is brought in the *debet et detinet*. The defendants plead, "fully adminiſtered;" to which the plaintiffs demurred.

An executor may bring debt on a leaſe for rent in the *debet et detinet* againſt the adminiſtrator *de bonis non* of the undertenant of the term, for rent incurred in his own time. S. C. Skin. 5. S. C. 2. Jones, 169. S. C. 2. Danv. 504. 266. 1. Lev. 128. 1. Cro. 125. 685. 3. Mod. 327. 30 Mod. 288. 356. 10. Mod. 12. 12. Mod. 7. 1. Wilſ. 4. 5. Com. Dig. 201.

SERJEANT HARDRES, *for the plaintiff*, ſaid, The action was well brought in the *debet et detinet*, for that nothing is aſſets but the profits over and above the value of the rent; and he cited *Hargrave's Caſe* (*a*), and the caſe of *Rich v. Frank* (*b*), and *Poph.* 120. Though if an executor be plaintiff in an action for rent incurred after the teſtator's death, he muſt ſue in the *detinet* only, becauſe whatever he recovers is aſſets: but though an executor

Cro. Eliz. 225. Poph. 120. 5. Co. 31. 1. Vent. 171. 2. Vent. 209. 1. Sid.

(*a*) Moor, 566. 5. Co. 31. 1. Brownl. 56. Godolph. 174. 237. Sed vide the caſe of Smith *v.* Norfolk, Cro. Car. 225. where it is ſaid, that Hargrave's Caſe is not law.

(*b*) 1. Brownl. 56. 2. Brownl. 202. Cro. Jac. 238. 1. Bulſt. 22. Godolph. 176.

PRATTLE *againſt* KING.

ecutor be plaintiff, yet if the leaſe were made by himſelf, he muſt ſue in the *debet et detinet*. Then the plea of "*fully adminiſtered*" is not a good plea; for he is charged for his own occupation. If this plea were admitted, he might give in evidence payment of debts, &c. for as much as the term is worth, and take the profits to his own uſe, and the leſſor be ſtript of his rent: in *Joſſelyn's Caſe (a)*, this plea was ruled to be ill.

* [186] And of that opinion THE COURT * was; and ſaid, That executors could not waive a term (though, if they could, they ought to plead it ſpecially), for it is naturally in them, and *primâ facie* is intended to be of more value than the rent *(b)*: if it ſhould fall out to be otherwiſe, the executors ſhall not be liable *de bonis propriis*, but muſt aid themſelves by ſpecial pleading. For the plea, they ſaid, there was nothing in it: and gave judgment for the plaintiff.

(a) Styles, 49. (b) Cro. Jac. 549.

Caſe 18.

Buckly *againſt* Howard.

To an action of debt on bond againſt an executor, if the defendant plead, that the teſtater was indebted to plaintiff upon A STATUTE MERCHANT yet in force, and no aſſets *ultra*, the plaintiff may reply, that the ſtatute was deſtroyed by fire.

1. Roll. Abr. 925. Stiles, 143. 1. Brown. 51. Dougl. 452.

DEBT upon two bonds, the one of twenty pounds, the other of forty pounds, againſt an adminiſtratrix. The defendant pleaded, that the inteſtate was indebted to the plaintiff in two hundred and fifty pounds, upon A STATUTE MERCHANT; which ſtatute is yet in force, not cancelled nor annulled; and that ſhe has not above forty ſhillings in aſſets, beſides what will ſatisfy this STATUTE. The plaintiff replies, that the STATUTE is burnt with fire. The defendant demurs.

By the opinions of WYNDHAM, ATKINS, and ELLIS, *Juſtices*, the plaintiff had judgment. For the defendant, by his demurrer, had confeſſed the burning of the ſtatute; which being admitted and agreed upon, it is certain that it can never riſe up againſt the defendant: for the ſtatute of the 23. *Hen.* 8. c. 6. concerning recognizances in the nature of A STATUTE STAPLE, refers to the ſtatute ſtaple, *viz.* that like execution ſhall be had and made, and under ſuch manner and form as is therein provided. THE STATUTE STAPLE 27. *Edw.* 3. c. 9. refers to the STATUTE MERCHANT 13. *Edw.* 1. ſt. 3. c. 1.; and that to the ſtatute of *Acton Burnel* 11. *Edw.* 1. c. which provides, that "if it be found "by *the Roll*, and by *the Bill*, that the debt was acknowledged, "and that the day of payment is expired, that then, &c." But if the ſtatute be burnt, it cannot appear that the day of payment is expired; and conſequently there can be no execution. If the recogniſee will take his action upon it, he muſt ſay, *hic in curiâ prolatâ*. 15. *Hen.* 7. *pl.* 16.

VAUGHAN, *Chief Juſtice*, differed in opinion. He ſaid, FIRST, That it is a rule in law, that matter *of record* ſhall not be avoided by matter *in pais*; which rule is manifeſtly thwarted by this reſolution. He ſaid, it was a matter of record to both parties; and

the

the plaintiff could not avoid it by ſuch a plea, any more than the defendant could avoid it by any other matter of fact. He cited * a caſe, where the obligee voluntarily gave up his bond to the obligor, and took it from him again by force, and put it in ſuit: the defendant pleaded this ſpecial matter, and the Court would not allow it; but ſaid, he might bring his action of treſpaſs. SECONDLY, Suppoſe the defendant had taken iſſue upon the ſtatute's being burnt, and it had been found to have been burnt, and yet had been found afterwards, the defendant could not have any benefit of this verdict. He ſaid it was a proper caſe for equity.

Co. Lit. 226. Poſt. 216.

2. Vern. 299.

Slater *againſt* Carew.

Caſe 19.

DEBT UPON A BOND. The condition was, That if the obligor, his heirs, executors, &c. do yearly, and every year, pay or cauſe to be paid to *Thomas* and *Dorothy* his wife, during their two lives, that then, &c. The huſband dies; and the queſtion was, Whether or no the payment ſhould continue to the wife?

A bond to pay an annuity to a man and his wife *during their two lives* becomes extinct on the death of either of them.

BALDWIN, *Serjeant*, argued, that the money is payable during their lives, and the longer liver of them: he cited *Brudnel's Caſe* (*a*), and *Hill's Caſe* (*b*), that whenever an intereſt is ſecured for lives, it is for the lives of them, and the longer liver of them.

1. Leon. 74. 103. 1. And. 151. 161. 11. Co. 3. b. Owen, 52. 1. Roll. Abr. 832. Raym. 126. Palm. 74. 108. 1. Vent. 163. 2. Vent. 74. 108. 1. Brownl. 46. 2. Brownl. 43. 9. Mod. 157. 10. Mod. 163. 11. Mod. 108. Caſ. Temp. Talb. 143.

SEYSE, *contra*. The intereſt of this bond is in the obligee; the huſband and wife are ſtrangers, and therefore the payment ceaſeth upon the death of either of them.

THE WHOLE COURT was of this opinion; and grounded themſelves upon that diſtinction in *Brudnel's Caſe*, betwixt where the *ceſtuy que vies* have an intereſt, and the caſes of collateral limitations. They ſaid alſo, that in ſome caſes an intereſt would not ſurvive, as if an office were granted to two, and one of them died, unleſs there were words of ſurvivorſhip in the grant. So the plaintiff was barred.

2. Ld. Ray. 1199. 1203. 1460. 2. Peer. Wms. 102. 280. 331. 347. 529. 3. Peer. Wms. 115. 158. 405. 408.

(*a*) 5. Co. 9. and Co. Litt. 219. b.

(*b*) Eaſter Term, 4. Jac. 1. Roll 112. Warburton's Reports.

MICHAELMAS TERM,

The Twenty-Sixth of Charles the Second,

IN

The Common Pleas.

Sir John Vaughan, *Knt. Chief Juſtice.*

Sir Robert Atkins, *Knt.*
Sir Hugh Wyndham, *Knt.*
Sir William Ellis, *Knt.*
} *Juſtices.*

Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

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* [188]

Caſe 20.

Farrer *againſt* Brooks, Adminiſtrators of Brooks.

If a defendant die after execution awarded, and before it is ſerved, yet the *teſte* of the writ binds the goods in the hands of his adminiſtrator; but in favour of purchaſors no writ of execution ſhall bind the property, but from the time of its *delivery* to the ſheriff.

THE PLAINTIFF had judgment in *debt* againſt *John Brooks* the inteſtate, and took out a *fieri facias*, bearing *teſte* the laſt day of *Trinity Term*, *de bonis et catallis* of *John Brooks*: before the execution of the writ *John Brooks* dies, and *Elizabeth Brooks* adminiſters: the ſheriff's bailiff executes the writ upon the inteſtate's goods in her hands.

BALDWIN, *Serjeant*, moved the Court for reſtitution, for that a *fieri facias* is a commiſſion, and muſt be ſtrictly purſued. Now the words of the writ are, "*de bonis* of *John Brooks*;" and by his death they ceaſe to be his goods. The plaintiff will be at no prejudice; the goods will ſtill remain liable to the judgment; only let the execution be renewed by *ſcire facias*, to which the adminiſtratrix may plead ſomewhat.

WYNDHAM, *Juſtice*. The property of the goods is ſo bound by the *teſte* of the writ, as that a ſale made of them *bona fide* ſhall

8. Co. 171. 2. Vent. 218. Comb. 33. 7. Mod. 195. 12. Mod. 130. 241. 1. Ld. Ray. 695. 2. Ld. Ray. 808. 850. 1073. 3. Peer. Wms. 399. The like point was adjudged in Dapin v. Cartwright, B. R. Hilary Term, 12. Geo. 2.

be

be avoided (*a*); which is a ſtronger caſe. And ſince the inteſtate himſelf could not have any plea, why ſhould we take care that the adminiſtrator ſhould have time to plead?

FARRER *againſt* BROOKE.

And of that opinion was ALL THE COURT, after they had adviſed with the Judges of the king's bench, who informed them that their practice was accordingly.—But VAUGHAN, *Chief Juſtice*, ſaid, That, in his opinion, it was clearly againſt the rules of the law.—But they ſaid there were caſes to this purpoſe in *Cro. Car. Roll. Moore, &c.*

(*a*) But now by 29. Car. 2. c. 3. ſ. 16. "No writ of *fieri facias*, or other "writ of execution, ſhall bind the property of the goods againſt whom ſuch "writ of execution is ſued forth, but "from the time that ſuch writ ſhall be "*delivered to the ſheriff*, under-ſheriff, "or coroners, to be executed; and for "the better manifeſtation of the ſaid "time, the ſheriff, under-ſheriff, and "coroners, their deputies and agents, "ſhall, upon the receipt of any ſuch "writ (without fee for doing the ſame), "indorſe upon the back thereof the day "of the month and year whereon he or "they receive the ſame."—See 2. Burr. 953. and the caſe of Hutchinſon *v.* Johnſton, 1. Term Rep. 729.

* Liefe *againſt* Saltingſtone.

Caſe 21.

EJECTMENT. The caſe upon a ſpecial verdict was thus: *Sir Richard Saltingſtone* being ſeiſed in fee of *Rees-Farm*, on the ſeventeenth day of *February*, in the nineteenth year of the king, made his will in writing, in which were theſe words, "ITEM, For *Rees-Farm* (in ſuch a place), I will and bequeath it "to my wife, during her natural life; and by her to be diſpoſed of "to ſuch of my children as ſhe ſhall think fit." *Sir Richard* died; his wife entered, and ſealed ſuch a writing as this, *viz.* "*Omnibus Chriſti fidelibus, &c. Noveritis*, That whereas my huſband, *Sir Richard Saltingſtone, &c.*" reciting that clauſe in the will, "I do diſpoſe the ſame in manner following; that is to ſay, "I diſpoſe it, after my deceaſe, to my ſon *Philip*, and his heirs for "ever." The wife died, and *Philip* entered, and died, and left the leſſor of the plaintiff his ſon and heir.

A deviſe "to "my wife *for* "*life*, and by "her to be "*diſpoſed of* "to ſuch of my "children as "ſhe ſhall think "fit," gives the wife an eſtate during her life, with *a power* to diſpoſe of the eſtate to any of their children *in fee*.

S. C. 1. Freem. 149. 163. 176. S.C.2.Lev.104. S.C.Carter,232. Jones, 137. Latch. 40. 939. Cro. Eliz. 16. 160. 3. Leon. 71. 1. Vern. 66. 2. Vern. 80. 376. 513. 10. Mod. 71. 1.Ld.Ray. 204. 1. Salk. 240. 2. Wilſ. 6.

The queſtion was, What eſtate *Philip* took? or, What eſtate the teſtator intended ſhould paſs out of him?

SCROGGS, *Serjeant*, in laſt *Eaſter* Term, and BALDWIN, *Serjeant*, in laſt *Trinity* Term, argued this caſe *for the plaintiff*; and they inſiſted upon the word "*diſpoſe*," That when a man deviſeth his land to be diſpoſed by a ſtranger, it has been always held to be a bequeathing of a fee-ſimple, or at leaſt a power to diſpoſe of the fee-ſimple; and they cited *Weſton v. Welſhe* (*a*); but they chiefly relied on the caſe of *Daniel v. Uply* (*b*).

WALLER, *Serjeant*, in *Eaſter* Term, and NEWDIGATE, *Serjeant*, in *Trinity* Term, argued *for the defendant*, That the

(*a*) Year-Book 19. Hen. 8. pl. 10. Moor, 57. Dyer, 98. b. in Marg.

(*b*) Latch. 9. 39. 134. Noy, 80. 1. Jones, 137. W. Benloe, 178.

LIFFE *against* SALTING-STONE.

heir at law ought not to be diſinherited without very expreſs words (*a*). That if the deviſor himſelf had ſaid in his will, "I diſ-"poſe of *Rees-Farm* to *Philip*," that *Philip* would have had no more than an eſtate for life; and what reaſon is there that the diſpoſal, being limited to another, ſhould carry a larger intereſt than if it had been executed by the teſtator himſelf?

This Term it was argued at the bench, and by the judgments of ELLIS, WYNDHAM, and ATKINS, *Juſtices*, the plaintiff had judgment. They agreed, that the wife took by the will an eſtate for her own life, with a power to diſpoſe of the fee. She cannot take a larger eſtate to herſelf by implication than an eſtate for life; be-
* [190] cauſe an eſtate for life is given to her by expreſs * limitation: *Whiting v. Wilkins* (*b*). For caſes reſembling the caſe in queſtion were cited, 7. *Edw.* 6. *Brook. tit.* "*Deviſe*" 39. 1. *Leon.* 159. and *Daniel v. Uply* (*c*); and *Clayton's Caſe* (*d*). It is objected, That in *Daniel v. Uply* there are theſe words, "at her will and "pleaſure;" to which they anſwered, That if ſhe have a power to diſpoſe according to her diſcretion, it is as ſhe herſelf pleaſeth; and then *Expreſſio eorum quæ tacitè inſunt, nihil operatur.* If I deviſe that *J. S.* ſhall ſell my land, he ſhall ſell the inheritance (*e*). Where the deviſor gives to another a power to diſpoſe, he gives to that perſon the ſame power that himſelf had.

VAUGHAN, *Chief Juſtice*, differed in opinion. He ſaid, It is plain that the word "*diſpoſe*" does not ſignify *to give*; for if ſo, then it is evident that the leſſor of the plaintiff cannot have any title: for if the wife were to give, then were the eſtate to paſs out of her; which could not be by ſuch an *appointment* as ſhe makes here, but muſt be by a legal conveyance. Beſides, ſhe cannot give what ſhe has not, and ſhe has but an eſtate for life. If then it does not ſignify *to give*, what does it ſignify? Let us a little turn the words, and a plain certain ſignification will appear. "I "will and bequeath *Rees-Farm* to ſuch of my children as my wife "ſhall think fit, at her diſpoſal:" at this rate the wife does but nominate what perſon ſhall take by the will. This is a plain caſe, and free from uncertainty and ambiguity, which elſe the word "diſpoſe" will be liable to.

But judgment was given for the plaintiff (*f*).

(*a*) See Denn *v.* Gaſkin, Cowp. 661.
(*b*) 1. Bulſt. 219.
(*c*) W. Jones, 137. Noy, 80. Latch. 11. 39. 135.
(*d*) 5. Co. 1.
(*e*) Keilway, 43, 44. 19. Hen. 8. fo. 9.
(*f*) See the caſe of Tomlinſon-*v.* Deighton, 1. Peer. Wms. 149. in point, and S. C. Salk. 239. 10. Mod. 31. Comyns Rep. 194. and 2. Eq. Caſ. Abr. 309. where it is alſo held, that the ſubſequent marriage of the widow is not a ſuſpenſion of ſuch a power, Finch, 346.; for the power is ſimply collateral to the eſtate, and the *ceſtui que uſe* of the power does not derive any intereſt from the donee of the power; ſhe being in ſuch caſe a mere inſtrument to carry the intent of the donor of the power into execution. Jones, 137. Noy, 80. Latch. 11. 39. 135. Powel on Powers, 31. 3. Atk. 712. 1. Term Rep. 43. 435. 2. Brown's Chan. Caſes, 22. 344. 588. 3. Brown's Chan. Caſes, 95. 243. 310.

Howell

Howell *againſt* King.

Caſe 22.

TRESPASS, for driving cattle over the plaintiff's ground. The caſe was, *A.* has a way over *B.*'s ground to *Black-Acre*, and drives his beaſts over *B.*'s ground to *Black-Acre*, and then to another place lying beyond *Black-Acre*. And, Whether this was lawful or no? was the queſtion, upon a demurrer.

If *A.* has a way from *B.* to *C.* and occupies lands beyond *C.* he cannot juſtify uſing the way to thoſe lands.

39. *Hen.* 6. pl. 6. Bro. Ab. 136. b. pl. 6.

It was urged, That when his beaſts were at *Black-Acre*, he might drive them whither he would.

On the other ſide it was ſaid, That by this means the defendant might purchaſe a hundred * or a thouſand acres adjoining to *Black-Acre*, to which he preſcribes to have a way; by which means the plaintiff would loſe the benefit of his land: and that *a preſcription* preſuppoſed *a grant*, and ought to be continued according to the intent of its original creation.

* [191]

1. Ro. Ab. 391. 1. Vent. 48. 10. Mod. 228. 300. Lutw. 113. 1. Ld. Ray. 75. Bull. N. P. 74. 1. Term Rep. 560.

THE WHOLE COURT agreed to this.—And judgment was given for the plaintiff.

Warren *Qui Tam, &c. againſt* Sayre.

Caſe 23.

THE COURT agreed in this caſe, That *an information* for not coming to church may be brought upon the ſtatute of 23. *Eliz.* c. 1. ſ. 5. only, reciting the clauſe in it that has reference to the 1. *Eliz.* c. 2.; and that this is the beſt and ſureſt way of declaring.

Information may be brought on 23. *Eliz.* c. 1. Cro. Eliz. 750. Cro. Jac. 142. 2. Leon. 5.

Allen, 49. 2. Show. 237. 340. 8. Mod. 43. 381. 11. Mod. 114. 2. Stra. 843. 1066. 1193. 1. Stra. 602. 2. Hale, 165. 2. Hawk. P. C. 358.

HILARY TERM,

The Twenty-Sixth and Twenty-Seventh of Charles the Second,

IN

The Common Pleas.

Sir Francis North, *Knt. Chief Juſtice.*

Sir Robert Atkins, *Knt.*
Sir Hugh Wyndham, *Knt.*
Sir William Ellis, *Knt.* } *Juſtices.*

Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

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*[192]
Caſe 24.

Williamſon *againſt* Hancock.

Hilary Term, 24. & 25. *Car.* 2. *Roll* 679.

A. being tenant for life, remainder to his ſon *B.* in tail, remainder to his own right heirs, levies a fine with *warranty* to the uſe of *C.* in fee. On the death of the tenant for life, this warranty deſcending on the ſon will bar his entry as remainder-man in tail, notwithſtanding the conuſee of the fine comes in by way of *uſe*; for the conuſee, or his heir, or his aſſignee, may plead the deed with the warranty *in bar* to an *ejectment* for the land. —S. C. 2. Mod. 14. S. C. 3. Keb. 408. S. C. 1. Freem. 162. 188. Ante, 181. Co. Lit. 215. Cro. Car. 370. 10. Mod. 3, 4. 142. 12. Mod. 512. Vaugh. 360. 3. Com. Dig. "Garranty."

TENANT for life, the remainder in tail. The tenant for life levies a fine to *J. S.* and his heirs, to the uſe of himſelf for years, and after to the uſe of *Hannah* and *Suſan Prinne* and their heirs, if ſuch a ſum of money were unpaid by the conuſor; and if the money were paid, then to *the uſe* of the conuſor and his heirs: and this fine was with *general warranty*. The tenant for life died, the money unpaid, and the warranty deſcended upon the remainder-man in tail.

The

The queſtion was, Whether the remainder-man were bound by this warranty or not (a)? WILLIAMSON *againſt* HANCOCK.

MAYNARD, *Serjeant*, argued, That becauſe the eſtate of the land is transferred *in the poſt* before the warranty attaches in the remainder-man, that therefore it ſhould be no bar. He agreed that a man who comes in by the limitation of an uſe ſhall be *an aſſignee* within the 32. *Hen.* 8. c. 34. by an equitable conſtruction of the ſtatute, becauſe he comes in by the limitation of the party, and not purely by act in law; but the preſent caſe is upon a collateral warranty, which is a poſitive law, and a thing ſo remote from ſolid reaſon and equity, that it is not to be ſtretched beyond the maxim: that the *ceſtuy que uſe* in this caſe ſhall not vouch is confeſſed on all hands, and there is the ſame reaſon why he ſhould not rebut. He ſaid, the reſolution mentioned in *Lincoln College Caſe (b)* was not in the caſe, nor could be; the warranty there was a particular warranty *contra tunc Abbatem Weſtmonaſterienſem et ſucceſſores ſuos*, which abbey was diſſolved long before that caſe came in queſtion. He ſaid, that JONES, *Juſtice*, upon the arguing the caſe of *Spirt v. Bence* (c), reported *Cro. Car.* ſaid, that he had been preſent at the judgment in *Lincoln College Caſe (d)*, and that there was no ſuch reſolution as is there reported. 3. Term Rep. 395. * [193]

BALDWIN, *Serjeant*, argued on the other ſide, That at the common law many perſons might rebut who could not take advantage of a warranty by way of voucher; as the lord by eſcheat, the lord of a villain, a ſtranger, tenant in poſſeſſion (e): *à fortiori*, he ſaid, he that is in by the limitation of an uſe, being in by the act of the party (though the law co-operate with it to perfect the aſſurance), ſhall rebut.

THE COURT was of opinion, that the *ceſtuy que uſe* might rebut; that though voucher lies in privity, an abator or intrudor might rebut (f). As to SERJEANT MAYNARD's objection, that he is *in the poſt*, they ſaid, they had adjudged lately in the caſe of *Fowle v. Doble (g)*, that a *ceſtuy que uſe* might rebut; ſo it was held in *Spirt v. Bence* (h), and in *Kendal v. Fox* (i):

(a) By 4. Ann. c. 16. ſ. 21. "All "*warranties* made by any tenant for "life of any lands, tenements, or hereditaments, the ſame deſcending or "coming to any perſon in remainder "or reverſion, ſhall be void and of none "effect.—AND all *collateral warranties* "of any lands, tenements, or hereditaments, by any anceſtor who has no "eſtate of inheritance in the ſame, "ſhall be void againſt his heir."—"By "this ſtatute," ſays MR. JUSTICE BLACKSTONE, "it ſhould ſeem that the "Legiſlature meant to allow, that the "collateral warranty of tenant in tail, "deſcending, though without aſſets, "upon a remainder-man or reverſioner, "ſhould ſtill bar the remainder or re"verſion." 2. Bl. Com. 303. See alſo Co. Lit. 373.; and Mr. Butler's note (2) Co. Lit. 373. b.

(b) 3. Co. 62.

(c) Cro. Car. 368.

(d) 3. Co. 62, 63.

(e) 35. Aſſ. pl. 9. 21. Aſſ. pl. 3. 45. Edw. 3. 18. 42. Edw. 3. 19. 3. Co. 62. 63.

(f) F. N. B. 135. Co. Lit. 385.

(g) Ante, 181.

(h) Cro. Car. 368.

(i) Jones, 199.

WILLIAMSON *againſt* HANCOCK.

that report in *Lincoln College Caſe*, whether there were any reſolution in the caſe or no, is founded upon ſo good reaſon, that conveyances ſince have gone according to it.

ATKYNS, *Juſtice*, ſaid, There was a difficult clauſe in the ſtatute of Uſes, 27. *Hen.* 8. c. 10. ſ. 14. *viz.* "That all and "ſingular perſon and perſons, and bodies politick which at any "time on this ſide the firſt day of *May* which ſhall be in the "year of our Lord 1536, &c. ſhall have any eſtate unto them "executed of and in any lands, tenements, or hereditaments by "the authority of this act, ſhall and may have and take the ſame "or like advantage, benefit, voucher, aid prayer, remedy, com-"modity, and profit by action, entry, condition, or otherwiſe, to "all intents, conſtructions, and purpoſes as the perſon or perſons "ſeiſed to their uſe of or in any ſuch lands, tenements, or hereditaments ſo executed, had, ſhould, might, or ought to have "had at the time of the execution of the eſtate thereof, by the "authority of this act, againſt any other perſon or perſons of or "for any waſte, diſſeiſin, treſpaſs, condition broken, or any other "offence, cauſe, or thing concerning or touching the ſaid lands "or tenements ſo executed by the authority of this act." By this clauſe they that came in by the limitation of an uſe before that day, were to have the like advantages by voucher or rebutter, as if they had been within the degrees. If the parliament thought it reaſonable, Why was it limited to that time? Certainly the makers of that law intended to deſtroy uſes utterly, and that there ſhould not be for the future any conveyances to uſes; but they ſuppoſed that it would be ſome ſmall time before all people would take notice of the ſtatute, and make their conveyances accordingly; and that might be the reaſon of this clauſe: but ſince, contrary to their expectations, uſes are continued, he could eaſily be ſatisfied, he ſaid, that *ceſtuy que uſe* ſhould rebut.

Moor, 859. Hob. 27. Cro. Car. 370, 371.

WYNDHAM, *Juſtice*, was of opinion, that *ceſtuy que uſe* might vouch: he ſaid, there was no authority againſt it, but only opinions *obiter*.

THE COURT all agreed for the defendant; and judgment was given accordingly.

*[194]

Caſe 25.

* Rogers *againſt* Davenant, Parſon of Whitechapel.

The ſpiritual court may, by excommunication, compel pariſhioners to repair the church; and when the veſtry have made a rate for that purpoſe may enforce the payment of it.—Ante, 79. Poſt. 236. 2. Mod. 8. 222. 259. 5. Co. 63. 67. 1. Vent. 367. 308. F. N. B. 50. 2. Inſt. 489. Poph. 197. 2. Roll. Abr. 289. 311. Fort. 346. 2. Ld. Ray. 1390.

NORTH, *Chief Juſtice*. The ſpiritual court may compel pariſhioners to repair their pariſh-church if it be out of repair, and may excommunicate every one of them till it be repaired; and thoſe that are willing to contribute muſt be abſolved, till the greater part of them agree to aſſeſs a tax; but the Court cannot aſſeſs them towards it. It is like to a bridge or a highway; a *diſtringas* ſhall iſſue againſt the inhabitants to make them

repair

repair it, but neither the king's court, nor the juſtices of peace, can impoſe a tax for it.

ROGERS *againſt* DAVENANT.

WYNDHAM, ATKYNS, and ELLIS, *Juſtices*, accorded, the churchwardens cannot, none but a parliament can impoſe a tax; but the greater part of the pariſh can make a bye-law: and to this purpoſe they are a corporation. But if a tax be illegally impoſed, as by a commiſſion from the biſhop to the parſon, and ſome of the pariſhioners, to aſſeſs a tax; yet if it be aſſented to, and confirmed by the major part of the pariſhioners, they in the ſpiritual court may proceed to excommunicate thoſe that refuſe to pay it.

See the ſtatute *Circumſpecte agatis*, 13. Edw. 1. ſtat. 4. c. 1.

Compton and his Wife *againſt* Ireland.

Caſe 26.

Michaelmas Term, 26. Car. 2. Roll 691.

To a *ſcire facias* by executors, on a judgment by teſtators, the defendant cannot plead a caption on a *ca. ſa.* and that he paid the debt to the gaoler; for a diſcharge on ſuch a payment is an eſcape.

SCIRE FACIAS by the plaintiffs as executors to have execution of a judgment obtained by their teſtator, *unde executio adhuc reſtat faciend.*

The defendant confeſſeth the judgment, but ſays, that a *capias ad ſatisfaciendum* iſſued againſt him; upon which he was taken, and was in the cuſtody of the warden of THE FLEET; and that he paid the ſum mentioned in the condemnation to the warden of THE FLEET, who ſuffered him to go at large. The plaintiff demurred.

THE COURT held this to be no plea, but that it was a voluntary eſcape in the warden; and judgment was given for the plaintiff.

1. Roll. Abr. 902.
1. Cro. 328.

Pract. Reg. 158. Cro. Eliz. 404. 2. Jones, 97. 8. Mod. 225. 366. 10. Mod. 206. 307. 351. 12. Mod. 230. 385. 541. 1. Ld. Raym. 399. 3. Peer. Wms. 36. 148.

* Haley's Caſe.

Caſe 27.

Proceedings after *habeas corpus* delivered are erroneous, altho' the writ was not returnable till after the Term.

PER CURIAM. If a *habeas corpus* be directed to an inferior court, returnable two days after the end of the Term, yet the inferior court cannot proceed contrary to the writ of *habeas corpus*.

NORTH, *Chief Juſtice*, cited the caſe of *Staples*, ſteward of *Windſor*; who hardly eſcaped a commitment, becauſe he had proceeded after a *habeas corpus* delivered to him (though the value were under five pounds) *(a)*, and would not make a return of it.

Ante, 28.
Cro. Car. 261.
T. Jones, 209.

3. Mod. 85. 6. Mod. 177. 12. Mod. 666. 1. Salk. 148. Tidd's Prac. 176. 178. 2. Burr. Rep. 758.

(a) See the 21. Jac. 1. c. 23. ſ. 4. 12. Geo. 1. c. 29. ſ. 3. 19. Geo. 3. c. 70.

Caſe 28. The King *againſt* the Biſhop of Rocheſter and Sir Francis Clerke.

Hilary Term, 24. & 25. Car. 2. Roll 594.

The king being ſeiſed of a manor to which an advowſon is appendant, and which were before held by *an abbot*, grants the manor, without the advowſon, to *a biſhop*, who regrants both the manor and advowſon to the king. A grant afterwards made by the king of the manor, with the appurtenances, naming the advowſon, and deſcribing the whole as formerly belonging to *the abbot*, and lately to *the biſhop*, paſſes the *advowſon*.—S. C. 2. Mod. 1. S. C. 3. Keb. 412. 1. Roll. Rep. 23. 1. Co. 44. 6. Co. 56. Hob. 229. Cro. Eliz. 632. Yelv. 48. Cro. Jac. 34. 297. 302. Lane, 75. 8. Co. 166. 5. Mod. 297. 1. Ld. Ray. 50. 297. 302.

THE CASE, UPON A SPECIAL VERDICT, was thus:—The king being ſeiſed in fee of the manor of *Leyborn*, in the county of *Kent*, to which the advowſon of the church of *Leyborn* is appendant (which manor came to him by the diſſolution of monaſteries, having been part of the poſſeſſions of the *Abbot of Gray-church*), granted the manor to the *Archbiſhop of Canterbury*, and his ſucceſſors, ſaving the advowſon: afterward the king preſents to the church, being void, *J. S.* The *Archbiſhop of Canterbury* grants the manor, and the advowſon, to the king, his heirs and ſucceſſors; which grant is confirmed by the dean and chapter. The king grants the manor with the appurtenances, and this advowſon (naming it in particular), "which lately did belong to the *Archbiſhop of Canterbury*, and to the *Abbot of Gray-church*, together with all privileges, profits, commodities, &c. in as ample manner as they came to the king's hand by the grant of the archbiſhop, or by colour or pretence of any grant from the archbiſhop, or confirmation of the dean and chapter, or by ſurrender of the late *Abbot of Gray-church*, or as amply as they are now, or at any time were in our hands, to *Sir Edward North*, and his heirs, &c."

* [196] The queſtion was, Whether or no, by this * grant, the advowſon paſſed?

NEWDIGATE, *Serjeant.* The king is not appriſed of his title, and therefore the grant is void *(a)*: for he thought this advowſon came to him by *grant* from the archbiſhop *(b)*. If the king be deceived in deed, or in law, his grant is void *(c)*.

(a) 1. Co. 52. a.
(b) Inglefield's Caſe, Moor, 318.

(c) Bro. "Patents," 104. 1. Co. 46. 51, 52. 10. Co. Arthur Legat's Caſe. Hob. 170. 228, 229, 230. 223. 243. 323. Dyer, 124. Moor, 888. 2. Co. 33. 11. Co. 90. 9. Hen. 6. 28. b. 2. Roll. 186. Co. Ent. 384.

HARDRES, *Serjeant, contra.* He laid down four grounds or rules, whereby to conſtrue the king's letters patents:—FIRST, Where a particular certainty precedes, it ſhall not be deſtroyed by an uncertainty, or a miſtake coming after *(d)*.—SECONDLY, There is a difference when the king miſtakes his title to the prejudice of his tenure or profit, and when he is miſtaken only in ſome deſcription of his grant, which is but ſupplemental, and not material nor iſſuable *(e)*.—THIRDLY, Diſtinct words of relation,

(d) Cro. Car. 34. 48. Yel. 42. 3. Leon. 162. 1. And. 148. 29. *Edw.* 3. pl. 71. b. 10. *Hen.* 4. pl. 2. Godb. 423. Markham's Caſe, cited in Arthur Legat's Caſe, 10. Rep.—

(e) 11. *Edw.* 4. pl 49. 33 *Hen.* 7. pl. 6. 36. *Hen.* 8. pl. 1, and 38. *Hen.* 6. pl. 37. 9. *Edw.* 4. pl. 11, 12. Lane, 111. 2. Co. 54. 1. Bulſtr. 4.

in

in the king's grant, are good to paſs away any thing (*a*).— FOURTHLY, When the king's grants are upon a valuable conſideration, they ſhall be conſtrued favourably for the patentee, for the honour of the king (*b*). Then he applied all theſe rules to the caſe in queſtion, and prayed judgment.

THE KING *againſt* THE BISHOP OF ROCHESTER, &c.

(*a*) Dyer, 350. 9. Co. 24. 10. Co. 4.

(*b*) 18. *Edw.* 2. "De Quo Warranto." 2. Inſt. 446, 447. 6. Co. Sir John Molyn's Caſe. 10. Co. 65. a.

MAYNARD, *Serjeant*, argued afterwards againſt the paſſing of the advowſon. He ſaid, thoſe two deſcriptions of the advowſon, *viz.* "belonging lately to the *Archbiſhop of Canterbury*," and "formerly to the *Abbot of Gray-church*," are coupled together with a conjunctive "*et*," ſo that both muſt be true. So here is a falſity in the firſt and material part of the grant, *viz.* the deſcription of the thing granted. Though the advowſon of *Leyborn* be named, yet it is ſo named, as to be capable of a generality; for there may be more advowſons than one belonging to that manor. This falſity goes to the title of the church. No ſubſequent words will aid this miſ-recital; for the deſcription of the thing granted ends there. The following words, "*adeo plenè, &c.*" and whatever comes after, do but ſet out how fully and amply he ſhould * enjoy the thing granted; and being no part of its deſcription, cannot enlarge it or make it more certain.

8. *Hen.* 4. pl. 2.

* [197]

TURNER, *Serjeant*, *contra*, cited the books named in the margin (*c*).

(*c*) Bacon's Elements, 96.

The caſe of the Queen v. Lewis, 1. Leon. 120. *Veritas nominis tollit errorem demonſtrationis.* 29. *Edw.* 3. pl. 7, 8. 1. And. 148. Plowd. 192. 2. Co. 32. Poph. 60. 10. Co. 113. 19. *Edw.* 3. Fitz. "Grants," 58. 10. *Hen.* 4. pl. 2. Sir John L'Eſtrange's Caſe. Markham's Caſe, 10. Co. in Arthur Legat's Caſe. Cro. Car. 548. Ann Needler's Caſe, in Hob. 9. *Hen.* 6. pl. 12. Bro. "Annuity," 3. Baker v. Bacon, Cro. Jac. 48. and Bozoun's Caſe, 4. Rep. 6. Co. 7. Cro. Jac. 34. 1. Leon. 119, 120. 2. Roll. "Prerog. le Roy," 200. 8. Co. 167. 21. *Edw.* 4. pl. 46. 8. Co. 56. Roll. "Prerog." 201. 10. Co. 64. 9. Co. the Earl of Salop's Caſe. Co. Lit. 121. b. Moor, 421. 2. Roll. 125.

THE COURT, this Term, gave their judgment, that the advowſon did well paſs. In this grant there are as large words, and the ſame words that are in *Whiſtler's Caſe* (*d*), and the king is not here deceived, neither in the value nor in his title. And judgment was given accordingly.

(*d*) 10. Co. 63. 1. Ro. Rep. 62. 2. Ro. Ab. 185. 292. 350.

Furnis *againſt* Waterhouſe. Caſe 29.

A SUPERSEDEAS was moved for, to ſtay proceedings upon a *grand cape* in dower, *quia erronicè emanavit*, Becauſe the return of the ſummons was not *after ſummons*, according to the ſtatute of 31. *Eliz.* c. 3. the words of which ſtatute are, "that "after every ſummons upon the land, in any real action, four-"teen days notice, at the leaſt, before the day of the return thereof, "proclamations of the ſummons ſhall be made on a *Sunday*, *&c.* "at or near the moſt uſual door of the churches or chapel of that "town or pariſh where the land, whereupon the ſummons was "made, doth lie, and that proclamation, ſo made, ſhall be return-"ed together with the names of the ſummoners."

The *grand cape* ſhall be ſuperſeded, if the return of the ſummons be contrary to 31. *Eliz.* c. 3. Poſt. 248. Jones, 7. 6. Mod. 4. 1. Lev. 105. 1. Salk. 216, 217.

SECONDLY,

FURNIS *againſt* WATERHOUSE.

SECONDLY, The land lieth in a vill called *Heriock*, and the return is of a proclamation of ſummons at the pariſh-church of *Halifax*; and it does not appear that the land lies within that pariſh.

THIRDLY, The return is, "*proclamari feci ſecundum formam ſtatuti:*" and it is not returned to have been made upon the land: *Hob.* 33. *Allen v. Walter.*

THE COURT. Theſe were all held erroneous; and the *grand cape* was ſuperſeded.

EASTER

EASTER TERM,

The Twenty-Seventh of Charles the Second,

IN

The Common Pleas.

Wedneſday, April 21, 1675.

Sir Francis North, *Knt. Chief Juſtice.*

Sir Robert Atkins, *Knt.*
Sir Hugh Wyndham, *Knt.*
Sir William Ellis, *Knt.*
} *Juſtices.*

Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

Naylor *againſt* Sharply, and other Coroners of the County-Palatine of Lancaſter.

Caſe 30.

A MAN brings an action of *debt* againſt *B.* ſheriff of the county-palatine of *Lancaſter*, and ſues him to an outlawry upon *meſne proceſs*, and has a *capias* directed to "the chancellor of the county-palatine," who makes a precept to the coroners of the county, being ſix in all, to take his body, and have him before the king's juſtices of the court of common pleas, at *Weſtminſter*, ſuch a day. One of the coroners being in ſight of the defendant, and having a fair opportunity to arreſt him, doth it not: but they all return *non eſt inventus*, though he were eaſy to be found, and might have been taken every day. Hereupon the plaintiff brings an action on the caſe againſt the coroners, and lays his action in *Middleſex*; and has a verdict of one hundred pounds.

If, on a *capias* to the county palatine of *Lancaſter*, the chancellor direct his precept to the *ſix* coroners of the county, an action on a falſe return of *non eſt inventus* will lie againſt the *ſix* jointly, although only *one* of them omitted to make the arreſt. —— *Sed quære*, In what county it muſt be brought.—S. C. Freem. 191. S. C. 2. Mod. 23. Ante, 37. Hob. 209. Cro. Jac. 533. 8. Mod. 226. 239. 380. 10. Mod. 54. 69. 300. 12. Mod. 71. 322. 349. 371. 408. 494. Comyns, 555. 1. Ld. Ray. 172. 258. 1. Stra. 313. 2. Stra. 1011. 2. Term Rep. 238.

NAYLOR *againſt* SHARPLY AND OTHERS.

BALDWIN, *Serjeant*, moved in arreſt of judgment, That the action ought to have been brought in *Lancaſter*. He agreed to the caſes put in *Bulwer's Caſe* (*a*), where the cauſe of action ariſes equally in two counties; but here all that the coroners do, ſubſiſts and determines in the county-palatine of *Lancaſter*; for they make a return to the chancery of the county-palatine only, and it is he that makes the return to the Court. He inſiſted upon the caſe of *Huſſe v. Gibbs* (*b*). SECONDLY, He ſaid this action is grounded upon two wrongs; one, the not arreſting him when he was in ſight; the other, for returning *non eſt inventus*, when he might eaſily have been taken: now for the wrong of one, all are charged, and entire damages given. He ſaid, two ſheriffs make but one officer, but the caſe of coroners is different: each of them is reſponſible for himſelf only, and not for his companion.

* [199] TURNER, *Serjeant*, and PEMBERTON, *contra*. *They ſaid, the action was well brought in *Middleſex*, becauſe the plaintiff's damage aroſe here, *viz.* by not having the body here at the day. They cited *Bulwer's Caſe* (*c*); and *Dyer* 159. b. The chancery returns to the Court the ſame anſwer that the coroners return to him, ſo that their falſe return is the cauſe of prejudice that accrues to the plaintiff here. The ground of this action is the return of *non eſt inventus*, which is the act of them all. That one of them ſaw him, and might have arreſted him, and that the defendant was daily to be found, &c. are but mentioned as arguments to prove the falſe return. And they conceived an action would not lie againſt one coroner, no more than againſt one ſheriff in *London*, *York*, *Norwich*, *&c.* But to the firſt exception taken by BALDWIN, they ſaid, Admitting the action laid in another county than where it ought, yet after verdict it is aided by the ſtatute of 16. & 17. *Car.* 2. c. 8. ſ. 1. "if the *venire* come from any place of the "county where the action is laid (*d*)." It is not ſaid, "in any place of the county where the cauſe of action ariſeth." Now this action is laid in *Middleſex*; and ſo the trial by a *Middleſex* jury good, let the cauſe of action ariſe where it will.

See 1. Freem. 410. 437.

THE COURT. That ſtatute doth not help your caſe; for it is to be intended when the action is laid in the proper county, where it ought to be laid, which the words "proper county" imply. But they inclined to give judgment for the plaintiff upon the reaſons given by TURNER and PEMBERTON.—*Adjournatur* (*e*).

(*a*) 7. Co. 1.

(*b*) Dyer, 38.

(*c*) 7. Co. 1. Jenk. 311. 4. Leon. 52.

(*d*) But either party, notwithſtanding this ſtatute, was at liberty to object to the default of hundredors; and therefore it is directed by 4. & 5. Ann. c. 16. that every *venire facias* ſhall be awarded from *the body* of the county in which the action is triable.—See alſo 1. Jac. 1. c. 13. and 24. Geo. 2. c. 18.

(*e*) Judgment was given for the plaintiff. S. C. 1. Freem. 192. See alſo S. C. 2. Mod. 84.

Keen

Keen *againſt* Kirby.

Caſe 31.

IT was reſolved in this caſe by THE WHOLE COURT, FIRST, That if there be tenant for life, the remainder for life, of a copyhold, and the remainder-man for life enter upon the tenant for life in poſſeſſion, and make a ſurrender, that nothing at all paſſeth hereby; for by his entry he is a diſſeiſor; and has no cuſtomary eſtate in him, whereof to make a ſurrender.

If a copyholder in remainder enter upon the tenant for life he is a diſſeiſor, and his ſurrender of the eſtate is void.

1. Roll. Abr. 504. 3. Leon. 221. S. C. Freem. 192. S. C. 2. Mod. 32. S. C. Carter, 237. 2. Danv. 199. 205. 4. Co. 32. 9. Co. 107. Cro. Car. 205. 1. Sid. 360. 1. Saund. 149. 2. Mod. 352. 11. Mod. 18. 53. 68. 94. 12. Mod. 123. 378. 1. Ld. Ray. 630. 2. Ld. Ray. 1000. 1145. Prec. in Ch. 568. 1. Stra. 452. 1. Peer. Wms. 16. 280. 330. 443. 781. 3. Peer. Wms. 9. 96. 283. 322. 358. See Faulkner *v.* Morſe, 3. Term Rep. 365.

SECONDLY, That when tenant for life of a copyhold ſuffers a recovery as tenant in fee, that this is no *forfeiture of his eſtate; for the freehold not being concerned, and it being in a court-baron, where there is no eſtoppel, and the lord that is to take advantage of it, if it be a forfeiture, being party to it, it is not to be reſembled to the forfeiture of a free-tenant: That cuſtomary eſtates have not ſuch accidental qualities as eſtates at common-law have, unleſs by ſpecial cuſtom.

*[200]

If a copyholder for life ſuffer a recovery in the court baron, as tenant of the fee, yet this is no forfeiture of the eſtate.

1. Roll. Abr. 508. Moor, 753. Co. Lit. 59. 4. Co. 23. a. 2. Mod. 33. 1. Term Rep. 738.

THIRDLY, That if it were a forfeiture, of this, and all other forfeitures committed by copyholders, the lord only, and not any of thoſe in remainder, ought to take advantage.—And they gave judgment accordingly.

If a copyholder for life commit forfeiture, the lord, and not he in remainder, ſhall take advantage of it.—1. Roll. Abr. 500. 9. Co. 107. 1. Saund. 151. 2. Mod. 33. 2. Jones. 189. 3. Lev. 94. Pollex. 620. Lutw. 803. 3. Term Rep. 162.

NORTH, *Chief Juſtice*, ſaid, That where it is ſaid in the caſe of *King v. Loder*, *Cro. Car.* 204, 205. that when tenant for life of a copyhold ſurrenders, &c. that no uſe is left in him, but whoſoever is afterward admitted comes in under the lord; that that is to be underſtood of copyholds in ſuch manors where the cuſtom warrants only cuſtomary eſtates for life, and is not applicable to copyholds granted for life with a remainder in fee. *Note.*

2. Roll. Abr. 462.

Anonymous.

Caſe 32.

A WRIT OF ANNUITY was brought upon a preſcription againſt the rector of the pariſh-church of *St. Peter* in, &c. The defendant pleads, that the church is overflown with the ſea, &c. The plaintiff demurs.

An annuity lies, by preſcription, againſt the parſon of a church; and it is no plea to ſay, that the church is deſtroyed; for it

NEWDIGATE, *Serjeant*, for the plaintiff. The declaration is good; for a writ of annuity lies upon a preſcription againſt a parſon, is due in reſpect of the profits which ariſe from the tithe and glebe.—Co. Lit. 144. 344. 1. Roll. Abr. 226. a. Bulſt. 149. Poph. 87. Cro. Eliz. 810. Co. Ent. 49. a. 2. Leon. 13.

ſon,

ANONYMOUS. ſon, but not againſt an heir: *F. N. B.* 152. *Raſtall* 32. The plea of the church being drowned, is not good: at beſt it is no more than if he had ſaid, that part of the glebe was drowned. It is not the building of the church, nor the conſecrated ground, in reſpect whereof the parſon is charged, but the profits of the tithes and the glebe. Though the church be down, one may be preſented to the rectory: 21. *Hen.* 7. *pl.* 1. 10. *Hen.* 7. *pl.* 13. 16. *Hen.* 7. *pl.* 9. and *Lutterel's Caſe*, 4. *Co.* 86.

WILMOT, *contra.* The parſon is charged as parſon of the church of *St. Peter:* we plead in effect, that there is no ſuch * [201] church, * and he confeſſeth it (*a*). We plead, That the church is *ſubmerſa, obruta, &c.* which is as much a diſſolution of the rectory, as the death of all the monks is a diſſolution of an abbathy. It may be objected, that the defendant has admitted himſelf rector by pleading to it. But I anſwer, FIRST, An eſtoppel is not taken notice of, unleſs relied on in pleading.—SECONDLY, The plaintiff by his demurrer has confeſſed the fact of our plea; by which means the matter is ſet at large, though we were eſtopped.

(*a*) 21. *Edw.* 4. pl. 83. Bro. Abr. 21. *Edw.* 4. pl. 20. 11. *Hen.* 7. pl. 49.

THE COURT was clearly of opinion for the plaintiff. The church is the cure of ſouls (*b*), and the right of tithes. If the material fabrick of the pariſh-church be down, another may be built, and ought to be.—Judgment was given for the plaintiff.

(*b*) The Year-Book 4. *Edw.* 3. pl. 27. Hobart, 153. Moor, 900. 1. Roll's Rep. 451. anciently ſeverable. Selden's Hiſtory of Tithes, cap. 6. 3. cap. 10. 2.

TRINITY

TRINITY TERM,

The Twenty-Seventh of Charles the Second,

IN

The Common Pleas.

Sir Francis North, *Knt. Chief Juſtice.*

Sir Robert Atkins, *Knt.*
Sir Hugh Wyndham, *Knt.*
Sir William Ellis, *Knt.* } *Juſtices.*

Sir William Jones, *Knt. Attorney General.*

Sir Francis Winnington, *Knt. Solicitor General.*

Vaughan *againſt* Atwood and Others.

Caſe 33.

A *cuſtom* to chuſe two ſurveyors to take care that no unwholeſome victuals are ſold within the precincts of a manor, with power to deſtroy whatever corrupt victuals they find expoſed to ſale, is good. S. C. 2. Mod. 56. Ante, 37. 85. 2. Danv. 431. Cro. Jac. 555. Palm. 211. Raym. 232. 1. Lev. 96. 8. Mod. 297. 11. Mod. 68. 98. 145. 161. 168. 2. Ld. Ray. 1163. Com. Dig. "Copyhold" (f. 6.). 1. Term Rep. 124.

TRESPASS for taking away ſome fleſh-meat from the plaintiff, being a butcher. The defendants juſtify by virtue of a cuſtom of the manor of, &c. That the homage uſed to chooſe every year two ſurveyors, to take care that no unwholeſome victuals were ſold within the precinct of that manor; and that they were ſworn to execute their office truly for the ſpace of a year; and that they had power to deſtroy whatever corrupt victuals they found expoſed to ſale; and that the defendants, being choſen ſurveyors, and ſworn to execute the office truly, examining the plaintiff's meat (who was alſo a butcher), found a ſide of beef corrupt and unwholeſome, and that therefore they took it away and burnt it, *prout eis bene licuit, &c.*—The plaintiff demurs.

NORTH, *Chief Juſtice.* This is a caſe of great conſequence, and ſeems doubtful. It were hard to diſallow the cuſtom, becauſe the deſign of it ſeems to be for the preſervation of men's health: and to allow it, were to give men too great a power of ſeizing and deſtroying other men's goods. There is an ale-taſter appointed

at

VAUGHAN *againſt* ATWOOD AND OTHERS.

at leets; but all his office is, to make preſentment at the leet, if he find it not according to the aſſiſe.

WYNDHAM, ATKINS, and ELLIS, *Juſtices*. It is a good reaſonable cuſtom: it is to prevent evil, and laws for *preventions* are better than laws for *puniſhment*. As for the great power that it ſeems to allow to theſe ſurveyors, it is at their own peril, if they deſtroy any victuals that are not really corrupt; for in an action, if they juſtify by virtue of the cuſtom, the plaintiff may take iſſue, that the victuals were not corrupt. But here the plaintiff has confeſſed it by the demurrer.

ATKYNS, *Juſtice*, ſaid, If the ſurveyors were not reſponſible, the homage that put them in muſt anſwer for them, according to the rule of *reſpondeat ſuperior*.—Judgment was given for the *plaintiff*, unleſs, &c. *(a)*.

(a) Judgment was given for *the defendant*; for the Court held it to be a good cuſtom. S. C. 2. Mod. 56.

* [203]

Caſe 34.

* Threadneedle *againſt* Lynham.

Trinity Term, 23. *Car.* 2. *Roll* 622.

If two manors have been uſually let for ſixty pounds a-year, and the biſhop grant a leaſe of one of them only, reſerving thereon the whole rent, yet this leaſe is good; for the 1. *Eliz.* c. 19. f. 6. ſays, that the old accuſtomed rent, *or more*, ſhall be reſerved.—S. C. 2. Mod. 57. S. C. Pollexf. 176. S. C. 1. Freem. 92. 119. 165. 179. S. C. 3. Keb. 192. 372. 583. 595. Co. Lit. 44. 5. Co. 5. 1. Cro. 95. 2. Mod. 57. 3. Mod. 249. 5. Mod. 244. 12. Mod. 249. Ld. Ray. 267. 2. Stra. 1201. 2. Salk. 537. Prec. Ch. 124. 1. Peer. Wms. 655. 3. Bac. Abr. 364. Dougl. 565. 573.

EJECTMENT. UPON A SPECIAL VERDICT, the caſe was thus: The jury found, that the lands in the declaration are, and time out of mind had been, parcel of the demeſnes of the manor of *Burniel*, in the county of *Cornwall*; which manor conſiſts of demeſnes, *viz.* copyhold tenements demiſable for one, two, or three lives, and ſervices of divers freehold tenants: that within the manor of *Burniel* there is another manor called *Trecaer*, conſiſting likewiſe of copyholds and freeholds; and that the *Biſhop of Exeter* held both theſe manors in the right of his biſhoprick. Then they find the ſtatute of 1. *Eliz.* c. 19. ſ. 6. *in hæc verba* *(a)*.

(a) By 1. Eliz. c. 19. ſ. 6. "All "gifts, grants, feoffments, fines, or "other conveyance or eſtates had, "made, done, or ſuffered, by any arch- "biſhop or biſhop, of any honors, caſtles, "manors, lands, tenements, or other "hereditaments, being parcel of the "poſſeſſions of his archbiſhoprick or "biſhoprick, or united, appertaining, or "belonging to any the ſame archbiſhop- "ricks or biſhopricks, to any perſon or "perſons, bodies politic or corporate, "other than to THE QUEEN, her heirs "or ſucceſſors, whereby any eſtate or "eſtates ſhould or may paſs from the "ſame archbiſhops or biſhops, or any "of them, other than for the term of "*twenty-one* years, or *three lives*, from "ſuch time as any ſuch leaſe, grant, or "aſſurance, ſhall begin, and whereupon "the old accuſtomed yearly rent, *or* "*more*, ſhall be reſerved and payable "yearly during the ſaid term of twenty- "one years, or three lives, ſhall be "utterly void, and of none effect, to "all intents, conſtructions, and pur- "poſes."

They

THREAD-NEEDLE *againſt* LYNHAM.

They find, that the old accuſtomed yearly rent, which uſed to be reſerved upon a demiſe of theſe two manors, was 67l. 1s. 5d. Then they find, that *Joſeph Hall, Biſhop of Exeter*, demiſed theſe two manors to one *Prowſe* for ninety-nine years, determinable upon three lives, reſerving the old and accuſtomed rent of 67l. 1s. 5d.: that *Prowſe*, living the *ceſtuy que vies*, aſſigned over to *James Prowſe* the demeſnes of the manor of *Trecaer*, for a certain ſum: that afterwards he aſſigned over all his intereſt, in both manors, to *Mr. Noſworthy*, excepting the demeſnes of *Trecaer*, then in the poſſeſſion of *James Prowſe*: that *Mr. Noſworthy*, when two of the lives were expired, for a ſum of money, by him paid to the *Biſhop of Exeter*, ſurrendered into his hands both the ſaid manors, excepting what was in the poſſeſſion of *James Prowſe*; and that the biſhop (*Joſeph Hall's* ſucceſſor) re-demiſed to him the ſaid manors, excepting the demeſnes of *Trecaer*, and excepting one meſſuage in the occupation of *Robert Mitchell*; and excepting one farm, parcel of the manor of *Burniel*, for three lives, reſerving 67l. 1s. 5d. with the *nomine pœnæ*.

The queſtion was, Whether this ſecond leaſe was a good leaſe, and the 67l. 1s. 5d. the old and accuſtomed rent, within the intention of the ſtatute of 1. *Eliz.* c. 19. ſ. 6.?

After ſeveral arguments at the bar, it was argued at the bench, in *Michaelmas Term*, in the 26. *Car.* 2. And the Court was divided, *viz.* VAUGHAN and ELLIS, againſt the leaſe; ATKINS and WYNDHAM for it.

NORTH, *Chief Juſtice*, now delivered his opinion, in which he agreed with ATKINS and WYNDHAM; ſo that * judgment was given in maintenance of the leaſe; and the judgment was affirmed in the king's bench upon a writ of error.

* [204]

See Pollexfen's Rep. 180.

Caſe 35.

The Chapter of the Collegiate Church of Southwell, } Plaintiffs,

againſt

The Biſhop of Lincoln, and *J. S.* Incumbent, } Defendants.

QUARE IMPEDIT. The incumbent's title was under a grant made by the plaintiffs, who were ſeiſed of the advowſon *ut de uno groſſo*, in the right of their church, of the next avoidance, one *Eſco* being then incumbent of their preſentation, to *Edward King*, from whom, by meſne aſſignments, it came to *Elizabeth Bley*, who after the death of *Eſco* preſented the defendant. Upon a demurrer theſe points came in queſtion:

A *chapter*, although it hath no *dean*, is within the 13. *Eliz.* c. 10.; which is a general law; and therefore if ſuch chapter grant *a next avoidance*, it is void *ab initio*; for otherwiſe, as there is no *dean* on whoſe death it might determine, it would be good for ever.—S. C. 2. Mod. 56. Poſt. 230. 248. 253. Ante 38. 6. Co. 25. Hardres, 356. Leon. 308. 3. Co. 60. Co. Lit. 45. 325. 341. 8. Mod. 61. 1. Peer. Wms. 655. Dougl. 573.

THE CHAPTER OF SOUTHWELL *againſt* THE BP. OF LINCOLN.

FIRST, Whether the grantors were within the ſtatute of the 13. *Eliz.* c. 10. which enacts, "that all leaſes, gifts, grants, feoffments, conveyances, or eſtates to be made, had, done, or ſuffered by any maſter and fellows of any college, dean and chapter of any cathedral or collegiate church, maſter or guardian of any hoſpital, parſon, vicar, or any other having either ſpiritual or eccleſiaſtical living, of any houſes, lands, tithes, tenements, or other hereditaments, being any parcel of the poſſeſſions of any ſuch college, cathedral, church, chapel, hoſpital, parſonage, vicarage, or other ſpiritual promotion, or any ways appertaining or belonging to the ſame, other than for the term of one and twenty years, or three lives, from the time as any ſuch leaſe or grant ſhall be made or granted, whereupon the accuſtomed yearly rent, or more, ſhall be reſerved, and payable yearly during the ſaid term, ſhall be utterly void and of none effect, to all intents, conſtructions, and purpoſes?"

SECONDLY, Whether a grant of *a next avoidance* be reſtrained by the ſtatute?

THIRDLY, If the grant be void, Whether it be void *ab initio*, or when it becomes ſo?

FOURTHLY, Whether the ſtatute of the 13. *Eliz.* c. 10. ſhall be taken to be *a general law?* for it is not pleaded.

JONES, *Serjeant*, for THE FIRST POINT, argued, That the grantors are within the ſtatute: the words are "dean and chapter," which, he ſaid, might well be taken ſeverally; for of this *chapter* there is no *dean*. If they were to be taken jointly, then a dean were not within this law in reſpect of thoſe poſſeſſions which he holds in the right of his deanry: but the ſubſequent general words do certainly include them; and would extend even to biſhops, but that they are ſuperior to all that are expreſſed by name.

THE SECOND POINT. He ſaid, the ſtatute reſtrains all gifts, grants, &c. other than ſuch upon which the old rent is reſerved, &c. He cited the caſe of the *Dean of Hereford* v. *Ballard* (*a*), 5. *Co.* the caſe of *Eccleſiaſtical Perſons* (*b*), and the *Earl of Saliſbury's Caſe* (*c*).

THE THIRD POINT. He held it void *ab initio*; it muſt be ſo, or good for ever; for here is no dean, after whoſe death it may
* [205] become void; as * *Hunt* v. *Singleton* (*d*): the chapter in our caſe never dies.

THE FOURTH POINT. He argued, That it is a general law, becauſe it concerns all the clergy: *Holland's Caſe* (*e*), and *Dumpor's Caſe* (*f*).

(*a*) Cro. Eliz. 440. 5. Co. 15.
(*b*) 5. Co. 14. a.
(*c*) 10. Co. 60. 5. Co. 3.
(*d*) Cro. Eliz. 473. 564. 3. Co. 60.
(*e*) 4. Co. 75. Cro. Eliz. 601. 2. Roll. Abr. 559. Moor, 542.
(*f*) 4. Co. 120. b. Cro. Eliz. 815. Co. Ent. 684.

WILLMOTT,

WILLMOTE, *contra*.

NORTH, *Chief Juſtice*, ATKINS, WYNDHAM, and ELLIS, *Juſtices*, all agreed upon the three points, as SERJEANT JONES had argued.

THE CHAPTER OF SOUTHWELL *againſt* THE BP. OF LINCOLN.

ATKINS, *Juſtice*, doubted whether the 13. *Eliz.* c. 10. were a general law, or not; but was over-ruled.

They all agreed, that the action ſhould have been brought againſt *the patron*, as well as againſt *the ordinary* and *the incumbent*; but that being only a plea *in abatement*, the defendant has waived the benefit thereof by pleading *in bar*. And judgment was given for the plaintiff, *niſi cauſa*, &c.

ATKINS ſaid, he thought the caſe of *Hunt v. Singleton* a hard caſe; conſidering, that the dean and the chapter were all perſons capable; that a grant ſhould hold in force as long as the dean lived, and determine then. He thought, they being a corporation aggregate of perſons who were all capable, that there was no difference betwixt that caſe and this.

ELLIS ſaid, That in *Lloyd v. Gregory* (*a*), reported in *Jones*, it was made a point; and that JONES, in his argument, denied the caſe of *Hunt v. Singleton* (*b*). He ſaid, that himſelf and SIR ROWLAND WAINSCOTT reported it, and that nothing was ſaid of that point; but that LORD COKE followed the report of BRIDGEMAN, who was three or four years their *puiſne*, and that he miſtook the caſe.

(*a*) 1. Jones, 405. Cro. Car. 502. (*b*) Cro. Eliz. 473. 564. 3. Co. 60.

Milward *againſt* Ingram. Caſe 36.

THE PLAINTIFF declares in an action on the caſe upon a *quantum meruit* for forty ſhillings, and upon an *indebitatus aſſumpſit* for forty ſhillings likewiſe. The defendant acknowledged the promiſes; but further ſays, that the plaintiff and he *accounted together* for divers ſums of money; and that upon the foot of the account, the defendant was found to be indebted to the plaintiff in three ſhillings, and that the plaintiff, in conſideration that the defendant promiſed to pay him thoſe three ſhillings, diſcharged him of all demands. The plaintiff demurred.

To an action on the caſe upon a *quantum meruit* and an *indebitatus aſſumpſit* the defendant may plead *infimul computaſſent*; and that in conſideration of paying the value the plaintiff promiſed to

THE COURT gave judgment againſt * the demurrer:—FIRST, They held, that if two men, being mutually indebted to each other, do account together, and the one is found in arrear ſo much, and

diſcharge him of all demands.—S. C. 2. Mod. 43. S. C. 1. Freem. 195. S. C. Sayer, 241. Poſt. 210. 262. Raym. 449. 2. Jones, 158. Cro. Jac. 620. Cro. Car. 384. 2. Leon. 214. 2. Sid. 177. 293. 3. Lev. 238. Ray. 42. 12. Mod. 517. 537. Fitzg. 202. Comyns, 98. 2. Ld. Ray. 235. 664. 680. 1. Com. Dig. "Aſſumpſit" (G.).

MILWARD *againſt* INGRAM.

there be an expreſs agreement to pay the ſum found to be in arrear, and each to ſtand diſcharged of all other demands; that this is a good diſcharge in law, and the parties cannot reſort to the original contracts. But NORTH, *Chief Juſtice*, ſaid, If there were but one debt betwixt them, entering into an account for that would not determine the contract.—SECONDLY, They held alſo, that any promiſe might well be diſcharged by parol, but not after it is broken, for then it is a debt.

Caſe 37.

Jones *againſt* Wait.

A recovery of lands lying within *a liberty* is good, altho' they lie in two diſtinct *towns* within the liberty.

S.C. 2. Mod. 47. under the name of Lever *v.* Hoſier. Poſt. 250. 1. Vent. 52. 143. 170. 2. Vent. 31. Freem. 241. Cro. Jac. 574. Cro. Car 269. 3. Com. Dig. 346. 2. Bac. Ab. 544. Cruiſe on Fines, 125. Cruiſe on Recov. 270. 2. Wilſ. 116. Cowp. 351.

EJECTMENT.—*Shrewſbury* and *Cotton* are towns adjoining: *Sir Samuel Jones* is tenant in tail of lands in both towns: *Shrewſbury* and *Cotton* are both within the liberties of the town of *Shrewſbury*. *Sir Samuel Jones* ſuffers a common recovery of all his lands in both vills; but the *præcipe* was of two meſſuages and cloſes thereunto belonging (theſe were in *Shrewſbury*), and of, &c. (mentioning thoſe in *Cotton*) lying and being in the vill of *Shrewſbury*, and the liberties thereof.

The queſtion was, Whether by this recovery the lands lying in *Cotton*, which is a diſtinct vill of itſelf, not named in the recovery, paſs or not?

SERJEANT JONES argued againſt the recovery, and he cited the caſes of *Monk v. Butler* (*a*), and *Fadeley v. Eaſton* (*b*). The writ of covenant, he ſaid, upon which a fine is levied, is a perſonal action; but a common recovery is a real action, and the land itſelf demanded in the *præcipe*. There is no precedent, he ſaid, of ſuch a recovery. He cited the caſe of *Baker v. Johnſon* (*c*), which, he ſaid, was a caſe in point, and reſolved for him.

But THE COURT were all of opinion, That the lands in *Cotton* paſſed; and gave judgment accordingly.—ELLIS, *Juſtice*, ſaid, If the recovery were erroneous, at leaſt they ought to allow of it till it were reverſed.

(*a*) Cro. Jac. 574. 2. Roll. Rep. 146. 175.

(*b*) Cro. Car. 269. 276. Godb. 440. 1. Jones, 301.

(*c*) Hutton, 206.

* [207]

Caſe 38.

* Lampen *againſt* Kedgewin.

If judgment be given againſt a plaintiff, upon the inſufficiency of his declaration, the defendant cannot plead this judgment to a ſecond action for the ſame cauſe, although the entry be a *nil capiat* inſtead of an *eat fine die*.—S. C. 2. Mod. 42. Cro. Jac 284. Brownl. 81. 8. Cr. 62. 1. Cro. 545. 12. Mod. 91. 204. 307. 316. 2. Wilſ. 113. 3. Wilſ. 240.

AN ACTION in the nature of a conſpiracy was brought by the plaintiff againſt the defendant; in which the declaration was inſufficient. The defendant pleaded an ill plea, but judgment was given againſt the plaintiff upon the inſufficiency of the

declaration;

declaration; which ought to have been entered, "*quòd defen-* "*dens eat inde ſine die*;" but by miſtake, or out of deſign, it was entered, *quia placitum prædictum, in formâ prædictâ ſupe-* "*rius placitat. materiaque in eodem contenta, bonum et ſufficiens* "*in lege exiſtit, &c. ideo conſideratum eſt per Cur. quòd quer.* "*nil capiat per billam.*" The plaintiff brings a new action, and declares right. The defendant pleads the judgment in the former action, and recites the record *verbatim* as it was; to which the plaintiff demurred. And judgment was given for the plaintiff, *niſi cauſa, &c.*

LAMPEN *againſt* KEDGEWIN.

NORTH, *Chief Juſtice.* There is no queſtion but that if a man miſtake his declaration, and the defendant demur, the plaintiff may ſet it right in a ſecond action: but here it is objected, that the judgment is given upon the defendant's plea. Suppoſe a declaration be faulty, and the defendant take no advantage of it, but pleads a plea in bar, and the plaintiff takes iſſue, and the right of the matter is found for the defendant; I hold, that in this caſe the plaintiff ſhall never bring his action about again; for he is *eſtopped* by the verdict: or ſuppoſe ſuch a plaintiff demur to the plea in bar; there by his demurrer he confeſſeth the fact, if well pleaded, and this *eſtops* him as much as a verdict would: but if the plea were not good, then there is no eſtoppel. And we muſt take notice of the defendant's plea; for upon the matter, as that falls out to be good or otherwiſe, the ſecond action will be maintainable or not.—THE OTHER JUDGES agreed with him *in omnibus.*

Hutt. 81. Cro. Car. 35. Stile, 201. 1. Bl. Rep. 309. 2. Bl. Rep. 831. 3. Wilſ. 309. 1. Cromp. Prac. 184.

The record in this caſe cannot be found. Vide caſe of Sherborn *v.* Stapleton, H. C. P. 13. Geo. 3. n. 136.

* Prince *againſt* Rowſon, Executor of Atkinſon. Caſe 39.

THE plaintiff declares againſt the defendant as executor. The defendant pleads, That the teſtator made his will, and that he the defendant, *ſuſcepto ſuper ſe onere teſtamenti prædict. &c.* did pay divers ſums of money due upon ſpecialties, and that there was a debt owing by the teſtator to the defendant's wife; and that he retained ſo much of the teſtator's goods as to ſatisfy that debt, and that he had no other aſſets.

A defendant executor muſt ſhew, that he is rightful executor, to intitle him to retain a debt due to his wife; for otherwiſe he ſhall be intended an executor *de ſon tort.*

S. C. 2. Mod. 51. 5. Co. 30. Yelv. 127. 12. Mod. 441. 471. 10. Mod. 496. 2. Stra. 1106. 1. Peer. Wms. 752. 766. 3. P. Wms. 189. 340. 351. 378. 2. Term Rep. 97. 597. 3. Ter. Rep. 58.

The plaintiff demurred, Becauſe for aught that appears the defendant is an executor *de ſon tort*, and then he cannot retain for his own debt: the plaintiff naming him in his declaration "ex- "ecutor of the teſtament of, &c." will not make for him, for that he does of neceſſity; he cannot declare againſt him any other way.

And of that opinion was ALL THE COURT, *viz.* that he ought to entitle himſelf to the executorſhip, that it may appear to the Court that he is ſuch a perſon as may retain.—And accordingly judgment was given for the plaintiff.

See the 30. Car. 2. c. 7. made perpetual by 4. & 5. Will. & Mary, c. 24

HILARY TERM,

Twenty-Seventh and Twenty-Eighth of Charles the Second,

IN

The Common Pleas.

Sir Francis North, *Knt. Chief Juſtice.*

Sir Robert Atkins, *Knt.*
Sir Hugh Wyndham, *Knt.* } *Juſtices.*
Sir William Ellis, *Knt.*

Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

Caſe 40.

* Smith *againſt* Tracy.

Children of the *half blood* ſhall ſhare under the ſtatute of diſtributions, 22. & 23. *Car.* 2. c. 10. with children of *the whole blood.*

A MAN dies, leaving iſſue by two ſeveral *venters, viz.* by the firſt three ſons, and by the ſecond two daughters. One of the ſons dies inteſtate; the elder of the two ſurviving brothers takes out adminiſtration; and SIR LIONEL JENKINS, Judge of the prerogative court, would compel the adminiſtrator to make diſtribution to the ſiſters of the half-blood. He prayed a prohibition:—but it was denied, upon advice by ALL THE JUDGES; for that the ſiſter of the half-blood, being a-kin to the inteſtate, and not *in remotiori gradu* than the brother of the whole blood, muſt be accounted in equal degree.

S. C. 2. Mod. 204.
S. C. 1. Eq. Abr. 249. S. C. 2. Lev. 173. S. C. 1. Vent. 307. 316. 323. S. C. 2. Vent. 317. S. C. 2. Jones, 93. S. C. 3. Keb. 601. 620. 663. 730. 776. 806. 831. S. C. 1. Freem. 288. 294. 2. Lev. 73. 2. Jones, 93. Fitzg. 126. 285. 10. Mod. 442. 12. Mod. 409. 566. 619. Gilb. Eq. Rep. 74. 184. 204. Comyns, 3. 87. Abr. Eq. 249. 1. Show. 1. Show. Parl. Caſ. 108. 1. Vernon, 403. ſaid to be ſettled ever ſince this caſe; and that before they uſed to give half a ſhare to one of the half-blood. 2. Vern. 124. 1. Peer. Wms. 25. 2. Peer. Wms. 344. 440. 446. 3. Peer. Wms. 40. 49. 102. 125. 194. 1. Ld. Ray. 571. 1. Vezey, 156. 333. 3. Wilſ. 379.

See 21. Hen. 8. c. 5. ſ. 3. 22. & 23. Car. 2. c. 10. 29. Car. 2. c. 3. and the 1. Jac. 2. c. 17.

Anonymous.

Anonymous. Caſe 41.

AN ACTION was brought againſt four men, *viz.* two attornies and two ſolicitors, for being attornies and ſolicitors in a cauſe againſt the plaintiff in an inferior court, *falſo et malitioſe* knowing that there was no cauſe of action againſt him: and alſo, for that they ſued the plaintiff in another court, knowing that he was an attorney of the common-pleas, and privileged there.

An action for *malicious proſecution* will not lie againſt one attorney for ſuing another in an inferior court, or for ſuing on the retainer of a client, although he knew there was no cauſe of action. 1. Roll. Rep. 408.

PER TOTAM CURIAM. There is no cauſe of action. For put the caſe as ſtrong as you will: Suppoſe a man be retained as an attorney to ſue for a debt which he knows to be releaſed, and that himſelf were a witneſs to the releaſe; yet the Court held, that the action would not lie; for that what he does, is only as ſervant to another, and in the way of his calling and profeſſion. And for ſuing an attorney in an inferior court; that (they ſaid) was no *cauſe of action: for who knows, whether he will inſiſt upon his privilege or not? And if he does, he may plead it, and have it allowed.

* [210]

2. Mod. 306. 5. Mod. 349. 405. 4. Prec. in Ch. 149. 3. Peer. Wms. 104. 2. Bl. Rep. 869.

6. Mod. 30. 90. 137. 169. 185. 261. 10. Mod. 41. 45. 263. 12. Mod.

Fits and Another *againſt* Freeſtone. Caſe 42.

IN AN ACTION grounded upon *a promiſe in law*, payment before the action brought is allowed to be given in evidence upon *non aſſumpſit*. But where the action is grounded upon *a ſpecial promiſe*, there payment, or any other legal diſcharge, muſt be pleaded.

On a *ſpecial promiſe* the defence muſt be pleaded; but on an *implied promiſe* it may be given in evidence on the general iſſue.—Ante, 206. March. 100. Allen, 29. Comyns, 373. 6. Mod. 131.—*Per* HOLT, *Chief Juſtice*. There is no ſuch thing as a promiſe in law. But ſee the caſe of Bedford *v.* Clarke, 2. Sid. 236. and Gilbert's Law of Evidence, Lofft's edit. 385. 404. Strange, 648. 1. Com. Dig. "Aſſumpſit" (H 8.). Bull. N. P. 129. 145.

Bringloe *againſt* Morrice. Caſe 43.

TRESPASS FOR IMMODERATELY RIDING THE PLAINTIFF'S MARE. The defendant pleaded, That the plaintiff lent to him the ſaid mare, *et licentiam dedit eidem equitare* upon the ſaid mare; and that by virtue of this licence the defendant and his ſervant *alternatim* had rid upon the mare. The plaintiff demurs.

If *A.* lend his horſe to *B.* to ride to a particular place, *B.* cannot give licence to another to ride; but if he hire the horſe, he may let another ride it.

SERJEANT SKIPWITH, *for the plaintiff*. The licence is perſonal and incommunicable; as 12. *Hen.* 7. *pl.* 25. 13. *Hen.* 7. *pl.* 13.; *the Ducheſs of Norfolk's Caſe*, 18. *Edw.* 4. *pl.* 14.

S. C. 3. Salk. 271. 2. Stra. 787. 2. Ld. Ray. 795. 913. 916. 2. Term Rep. 166.

SERJEANT NEWDIGATE, *contra*. This licence is given by the party, and not created by law, wherefore no treſpaſs lieth: 8. *Co.* 146, 147.

THE COURT. The licence is annexed to the perſon, and cannot be communicated to another: for this riding is matter of pleaſure.—NORTH, *Chief Juſtice*, took a difference, where a cer-

BRINGLOE *against* MORRICE.

tain time is limited for the loan of the horſe, and where not. In the firſt caſe, the party to whom the horſe is lent, hath an intereſt in the horſe during that time, and in that caſe his ſervant may ride, but in the other caſe not. A difference was taken betwixt *hiring* a horſe to go to *York*, and *borrowing* a horſe: in the firſt place the party may ſet his ſervant up; in the ſecond not *(a)*.

(*a*) The objection was, that the defendant pleaded licence for the taking, but gave no anſwer to the immoderate riding; and the Court adjudged the plea good; *the taking* being the *git*, and the *riding* only aggravation of the treſpaſs. S. C. 3. Salk. 271.

TRINITY

EASTER TERM,

The Twenty-Eighth of Charles the Second,

IN

The Common Pleas.

Sir Francis North, *Knt. Chief Juſtice,*

Sir Robert Atkins, *Knt.*
Sir Hugh Wyndham, *Knt.*
Sir William Ellis, *Knt.*
} *Juſtices.*

Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

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* Brook *againſt* Sir William Turner.

Caſe 44.

A wife, by the conſent of her huſband, may make an *appointment* in the nature of *a will*; but the ſpiritual court cannot try the fact, whether a huſband has given his wife ſu a power; and therefore, on a ſuggeſtion that a teſtatrix was a married woman, the ſuperior courts will pro-

A MAN, upon marriage, covenanted with his wife's relations to let her make a will of ſuch and ſuch goods: ſhe made a will accordingly by her huſband's conſent, and died. After her death her will being brought to the prerogative court to be proved, a prohibition was prayed by the huſband upon this ſuggeſtion, That the teſtatrix was *fœmina viro cooperta*, and ſo diſabled by the law to make a will.—PER CURIAM. Let a prohibition go, *niſi cauſa, &c.*

NORTH, *Chief Juſtice.* When a queſtion ariſes concerning the juriſdiction of the ſpiritual court, as, Whether they ought to have the probate of ſuch a will? Whether ſuch a diſpoſition of a perſonal eſtate be a will, or not? Whether ſuch a will ought to be proved before *a peculiar*, or before *the ordinary?* Whether by the archbiſhop of one province, or another, or both? and,

hibit the prerogative court from granting a probate.—S. C. 2. Mod. 170. S. C. 3. Keb. 624. Fitz. "Deviſe" 28. 1. Roll. Abr. 608. Cro. Eliz. 27. Cro. Car. 219. 376. 2. Danv. 518. Moor, 339. 2. And. 92. 1. Roll. Abr. 912. Hob. 17. N. Lutw. 10. 11. Mod. 221. 1. Vern. 244. 408. 2. Vern. 329. Prec. in Chan. 44. 84. 255. 2. Peer. Wms. 82. Gilb. Dev. 12. 2. Stra. 891. 1111. 1118. 1. Salk. 313. 2. Bl. Com. 498.

What

Brook *againſt* Sir William Turner.

What ſhall be *bona notabilia (a)?* in theſe and the like caſes, the common law retains the juriſdiction of determining. There is no queſtion, but that here is a good ſurmiſe for a prohibition; to wit, that the woman was a perſon diſabled by the law to make a will: the huſband may by covenant depart with his right, and ſuffer his wife to make a will, but whether he hath done ſo here or not, ſhall be determined by the law: we will not leave it to their deciſion; it is too great an invaſion upon the right of the huſband. In this caſe the ſpiritual court has no juriſdiction at all; they have the probate of wills, but a *feme covert* cannot make a will: if ſhe diſpoſeth of any thing by her huſband's conſent, the property of what ſhe ſo diſpoſeth, paſſeth from him to her legatee, and it is the gift of the huſband. If the goods were given into another's hands in truſt for the wife, ſtill her will is but a declaration of the truſt, and not a will properly ſo called; but of things in action, and things that a *feme covert* hath as executrix, ſhe may make a will by her * huſband's conſent; and ſuch a will being properly a will in law, ought to be proved in the ſpiritual court.—In the caſe in queſtion a prohibition was granted *(b)*.

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(*a*) Sed vide 10. Mod. 272. and Salk. 547.

(*b*) See S. C. 2. Mod. 170. where it is ſaid, that the party was ordered to declare in prohibition, and a trial had at the bar of the court. But it ſeems to be ſettled, by the caſe of Jenkin *v.* Whitehouſe, 1. Burr. Rep. 431. that the eccleſiaſtical court has not juriſdiction on the queſtion, Whether a huſband has given his wife a power to make *an appointment?* but that that fact, if diſputed, muſt be aſcertained by the common law, and then the eccleſiaſtical court may grant *a probate*, or rather adminiſtration with the paper annexed, which creates the appointment; for by the caſe of Stone *v.* Forſyth, Dougl. 707. it muſt be *proved* in the ſpiritual court before it can be given in evidence. See alſo Fettiplace *v.* Gages, 3. Brown's Rep. Chan. 8. that when perſonal property is given to *a feme covert* to her *ſole and ſeparate uſe*, ſhe may diſpoſe of it by will, without *the aſſent* of her huſband; but the probate muſt be produced to juſtify the payment of the money. Cothay *v.* Sydenham, 2. Brown's Rep. Chan. 391.

Caſe 45. ——— *againſt* the Hamburgh Company.

The *goods* and *debts* of a CORPORATION are liable to *foreign attachment*, by the cuſtom of London.

4. C. Freem. 207.
1. Ro. Ab. 554.
Cro. Eliz. 186. 598.
Carth. 25.
Latch. 208.
2. Bac. Ab. 689.

THE plaintiff brought an action of debt in *London* againſt the *Hamburgh Company*, who not appearing upon ſummons, and a *nihil* being returned againſt them, *an attachment* was granted to attach debts owing to the Company, in the hands of fourteen ſeveral perſons: by *certiorari* the cauſe was removed into this court; and, Whether a *procedendo* ſhould be granted, or not? was the queſtion.

GOODFELLOW, BALDWIN, and BARRELL, *Serjeants*, argued, That a debt owing to a corporation is not attachable.

MAYNARD, *Serjeant*, and SCROGGS, *contra*.

THE COURT.—We are not judges of the cuſtoms of *London*, nor do we take upon us to determine, Whether a debt owing to a corporation be within the cuſtom of *foreign attachment*, or not? This we judge and agree in, that it is not unreaſonable that a corporation's

corporation's debts ſhould be attached: if we had judged the cuſtom unreaſonable, we could and would have retained the cauſe; for we can over-rule a cuſtom, though it be one of the cuſtoms of *London* that are confirmed by act of parliament, if it be againſt natural reaſon (*a*). But becauſe in this cuſtom we find no ſuch thing, we will return the cauſe (*b*). Let them proceed according to the cuſtom, at their peril. If there be no ſuch cuſtom, they that are aggrieved may take their remedy at law. We do not dread the conſequences of it. It does but tend to the advancement of juſtice.

againſt THE HAMBURGH COMPANY.

By NORTH, *Chief Juſtice*, WYNDHAM and ELLIS, *Juſtices*, ATKINS *aberat*, a *procedendo* was granted accordingly.

(*a*) The cuſtoms of London are confirmed by 9. Hen. 3. c. 9. and the 7. Rich. 2. c. 39.; but this is intended of cuſtoms not repugnant to law. 3. Inſt. 20. 4. Inſt. 250. Cro. Eliz. 689. 1. Sid. 288.

(*b*) The cuſtom of *foreign attachment* was certified by STARKEY, *Recorder*, in the 22d year of Edward the Fourth, 1. Roll. Abr. 554.; and therefore the Court muſt take notice of it; Dougl. 380. 3. Wilſ. 297. 2. Bl. Rep. 834; but there is no mention that this cuſtom extends to corporations. Cro. Eliz. 186.

* Anonymous.

Caſe 46.

PER CURIAM. If a man is indicted upon the ſtatute 3. *Jac.* 1. c. 5. ſ. 11, 12. of recuſancy, conformity is a good plea; but not, if an *action of debt* be brought.

Conformity is a good plea to an indictment for *recuſancy*.

Raym. 339. 465. 2. Jones, 187. 1. Roll. 95. 2. Bulſt. 324. 2. Show. 331. 8. Mod. 43. 381. 1. Ld. Ray. 243. 1. Hawk. P. C. 30.

Parten and Baſeden's Caſe.

Caſe 47.

PARTEN brought an action of debt, in this court, againſt the teſtator of *Baſeden*, the now defendant; and had judgment; after whoſe death, there was *a devaſtavit* returned againſt the defendant *Baſeden*, his executor: he appeared to it, and pleaded; and a ſpecial verdict was found to this effect:

If a perſon named in a will *executor* before probate, poſſeſſes himſelf of the goods of the teſtator, pays a debt, converts the reſidue, and then refuſes to take out a probate; an adminiſtration granted to the widow, on this refuſal, is void; for he continues an executor *de ſon tort*, and is liable in debt to the creditors of the deceaſed.

The defendant, *Baſeden*, was made executor by his will, and dwelt in the ſame houſe in which the teſtator lived and died; and before probate of the will he poſſeſſed himſelf of the goods of the teſtator, prized them, inventoried them, and ſold part of them, and paid a debt, and converted the value of the reſidue to his own uſe; afterwards, before the ordinary he refuſed, and upon his refuſal, adminiſtration was committed to the widow of the deceaſed.

The queſtion was, Whether or no the defendant ſhould be charged to the value of the whole perſonal eſtate, or only for as much as he converted?

5. Mod. 136. Vaugh. 182. 12. Mod. 441. 471. 2. Peer. Wms. 145. 3. Peer. Wms. 251. 337. 2. Term Rep. 97. 597.

BARRELL,

PARTEN AND BASEDEN'S CASE.

BARRELL, *Serjeant*, argued, That he ought to be charged for the whole; Becauſe, FIRST, He is made executor by the will; and he is thereby compleat executor before probate, to all intents but bringing of actions. SECONDLY, He has poſſeſſion of the goods, and is chargeable in reſpect of that. THIRDLY, He cauſed ſome to be ſold, and paid a debt; which is a ſufficient adminiſtration. There is found to diſcharge him, FIRST, His refuſal before the ordinary. But that being after he had ſo far intermeddled, avails nothing: *Henſloe's Caſe*, 9. *Co.* 37. An executor *de ſon tort*, he confeſſed, ſhould not be charged for more than he converted; and ſhall diſcharge himſelf by delivering over the reſt to
* [214] the rightful executor. But the caſe is * different of a rightful executor, that has taken upon him the burthen of a will. The ſecond thing found to diſcharge him, is the granting of adminiſtration to another; but that is void, becauſe he is a rightful executor that has adminiſtered; in which caſe the ordinary has no
Howd. 276. power to grant adminiſtration: *Hob.* 46. *Keble v. Oſbaſton.* The third thing found to diſcharge him, is the delivery of the goods over to the adminiſtrator; but that will not avail him, for himſelf became reſponſible by his having poſſeſſion, and he cannot diſcharge himſelf by delivering the goods over to a ſtranger, that has nothing to do with them. If it be objected, that by this means two perſons will be chargeable in reſpect of the ſame goods; I anſwer, That payment by either diſcharges both: *Cro. Car.* 88. *Whitmore v. Porter.*

2. Lev. 55. 90. 282. 3. Lev. 157. 286. 305. 3. Sid. 280. 293. 372. 2. Saund. 148. 3. Bol. 979. 2. Ante, 62. 2. Stra. 918. 2. Peer. Wms. 8. 43. 49. 767.

THE COURT was of opinion, That the committing of adminiſtration, in this caſe, is a mere void act. A great inconvenience would enſue, if men were allowed to adminiſter as far as they would themſelves, and then to ſet up a beggarly adminiſtrator; they would pay themſelves their own debts, and deliver the reſidue of the eſtate to one that is worth nothing, and cheat the reſt of the creditors. If an adminiſtrator bring an action, it is a good plea to ſay, That the executor made by the will has adminiſtered. Accordingly judgment was given for the plaintiff.

3. Peer. Wms. 183. 251.

Caſe 48. Major and Stubbing *againſt* Birde and Harriſon.

A plea in abatement is good, although it contain matter *in bar*

RESOLVED, That a plea may be a good plea *in abatement*, though it contain matter that goes *in bar*. They relied upon the caſe in the YEAR BOOK 10. *Hen.* 7. *fol.* 11. which, they ſaid, was a caſe in point, and *Salkell v. Skelton*, 2. *Roll. Rep.* 64. And judgment was given accordingly.

S.C. Freem. 208. S. C. 2. Mod. 63. 5. Mod. 131. 146. 6. Mod. 102. 1. Sid. 189. 1. Show. 4. 1. Lev. 312. Moor, 692. 2. Saund. 128. 10. Mod. 112. 192. 8. Mod. 43. 12. Mod. 503. 1. Ld. Ray. 328. 337. 593. 694. 2. Ld. Ray. 1208. 4. Bac. Abr. 50.

TRINITY TERM,

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* Anonymous.

Caſe 1.

NORTH, *Chief Juſtice.* If there are accounts between two merchants, and one of them become bankrupt, the courſe is not to make the other, who perhaps upon ſtating the accounts is found indebted to the bankrupt, to pay the whole that originally was intruſted to him, and to put him for the recovery of what the bankrupt owes him, into the ſame condition with the reſt of the creditors; but to make him pay that only which appears due to the bankrupt on the foot of the account;

A creditor may *ſet* off his debt againſt his bankrupt debtor, and *pay over or prove* the balance, as it ſhall happen to be.

Ante, 93.
10. Mod. 432.
12. Mod. 446. Fitzg. 282. 2. Vern. 203. 428. Abr. Eq. 55. 2. Ld. Ray. 871. 2. Stra. 995. 1157. 1. Peer. Wms. 238. 2. Peer. Wms. 500. 3. Peer. Wms. 23. 85. 405. 408. 1. Atk. 110.

otherwiſe

ANONYMOUS'S otherwiſe it will be for accounts betwixt them after the time of the other's becoming bankrupt, if any ſuch were (*a*).

(*a*) By the 5. Geo. 2. c. 30. ſ. 28. "Where it ſhall appear to the *commiſſioners* that there has been *mutual credit* and *mutual debts* between the bankrupt and any other perſon previous to the bankruptcy, one debt may be ſet againſt another; and what ſhall appear to be due on either ſide, and no more, ſhall be *claimed* or *paid* on either ſide reſpectively." And by the 2. Geo. 2. c. 22. and 8. Geo. 2. c. 24. it is enacted, "That when there are mutual debts between *a plaintiff* or *defendant* one debt may be ſet againſt the other, and either pleaded in bar or given in evidence on the general iſſue at the trial." It was decided, however, that theſe ſtatutes could not be pleaded by a debtor to a bankrupt in an action againſt him by the aſſignees; for as between them there could not be mutual debts; becauſe, as the debtor could have no action againſt *the aſſignees*, there were not mutual remedies. Real v. Larkin, 1. Wilſ. 155. But in a later caſe the Court ſeemed to impeach this deciſion, as againſt the general principles of law, juſtice, and good ſenſe. Ridout v. Brough, Cowp. 135.; and it is now held, that a defendant may ſet off a debt due to him from a bankrupt; for *the aſſignees* are to be conſidered as *the bankrupt*. 1. Cooke's B. L. 2d edit. 575. See alſo Lock v. Bennet, 2. Atk. 49. 2. Stra. 1234. 1. Atk. 119. 126. 231. 237. 3. Atk. 691. 1. Vezey, 375. 1. Peer. Wms. 326. Dough. 97. 104. 407. 1. Term Rep. 112. 285. The caſes of French v. Cox, Cook's B. L. 577. and Parker v. Carter, Cooke's B. L. 589. 2. Term Rep. 476. 3. Term Rep. 435. 507.

Caſe 2.

Wing *againſt* Jackſon.

An action of treſpaſs on *the caſe* will lie in a *county court*, but not treſpaſs *vi et armis*.

1. Ro. Ab. 543. 2. Lev. 93. 2. Hawk. P. C. 5.

TRESPASS, *quare vi et armis* the defendant *inſultum fecit* upon the plaintiff, was brought in THE COUNTY-COURT; and judgment there given for the plaintiff.—But it was reverſed here upon a writ of *falſe judgment*, becauſe THE COUNTY-COURT, not being a *court of record*, cannot *fine* the defendant, as he ought to be if the cauſe go againſt him, becauſe of the *vi et armis* in the declaration; but an action of treſpaſs without thoſe words will lie in the county-court well enough.

* [216]

Caſe 3.

* Anonymous.

Tithe of cattle on waſte grounds ſhall be paid to the parſon of the pariſh in which the owner dwells.

2. C. 2. Danv. 592. 604. 2 Inſt. 651. Savil, 60. Gilb. Eq. Rep. 229.

A VICAR libelled in the ſpiritual court for tithes of *young cattle*; and ſurmiſed, that the defendant was ſeiſed of lands in *Middleſex*, of which pariſh he was vicar, and that the defendant had common in a great waſte, called *Sedgemore-Common*, as belonging to his land in *Middleſex*, and put his cattle into the ſaid common. The defendant prayed *a prohibition*, for that the land where the cattle went, was not within the county of *Middleſex*.

FIRST, As for this, no prohibition was granted, becauſe of that clauſe in 2. & 3. *Edw.* 6. c. 13. whereby it is enacted, "That all and every perſon which hath or ſhall have any beaſts or other cattle titheable, going, feeding, or depaſturing in any waſte or common ground, whereof the pariſh is not certainly known, ſhall pay their tithes for the increaſe of the ſaid cattle ſo going in the ſaid waſte or common, to the parſon, vicar, proprietor, portionary, owner, or other their farmers or deputies of the pariſh, hamlet, town, or other place where the owner of the ſaid cattle inhabiteth or dwelleth."

The

SECONDLY, The ſame plaintiff libelled againſt the ſame defendant for tithes of *willow-faggots*; who ſuggeſts, to have a prohibition, the payment of two-pence a year to the rector for all tithes of *willow*.—THE COURT held, that *a modus* to the rector is a good diſcharge againſt the vicar.

A *modus* to the *rector* is a good diſcharge from tithe againſt the *vicar*.

Poſt. 229. Yelv. 86. Cro. Jac. 116. Winch. 2. 44. 1. Vent. 61. 2. Peer. Wms. 522. 1. Ld. Ray. 242.

Ante, 50. Comyns, 638.

THIRDLY, The ſame plaintiff libelled alſo for tithes of *ſheep*. The defendant, to have a prohibition, ſuggeſts, that he took them in to feed, after the corn was reaped, *pro melioratione agriculturæ infra terras arabiles et non aliter*.—THE COURT held, that the parſon ought not to have tithe of *the corn* and *the ſheep* too, which make the ground more profitable, and to yield more. *Per quod*, &c.

Sheep fed in ſtubble-fields ſolely for the purpoſe of manuring the land are not titheable.

Poph. 142. 178. 3. Bulſt. 238. 2. Peer. Wms. 463. 1. Ld. Ray. 129. 137.

Ingram *againſt* Tothill and Ren. Caſe 4.

REPLEVIN. *Trevill* leaſed to *Ingram* for ninety-nine years, if *Joan Ingram* his wife, *Anthony* and *John Ingram* his ſons ſhould ſo long live, rendering an heriot, or forty ſhillings to the leſſor and his aſſigns, at the election of the leſſor, his heirs and aſſigns, after their ſeveral deaths *ſucceſſivè*, as they are named in the indenture. *Trevill* deviſeth the reverſion. *John* dies, and then *Joan* dies. The queſtion was, * Whether or no *a heriot* were due to the deviſee upon the death of *Joan?*

In an avowry under a leaſe for years, if *A. B.* and *C.* ſhould ſo long live, rendering a heriot, or 40s. after their ſeveral deaths, it muſt be averred, that the parties were alive at the time of the diſtreſs.

THE COURT agreed, that the avowry was faulty, becauſe it does not appear thereby, whether *Anthony Ingram* was alive, or not, at the time of the diſtreſs taken; for if he were dead, the leaſe would be determined.

* [217]

S. C. 2. Mod. 93. 281. S. C. 3. Keb. 785. 829. S. C. 1. Vent. 314. 2. Lev. 210. Ante 63. Co. Lit. 43. 147. 471. Cro. Car. 314. Cro. Eliz. 321. 589. 1 Saw. 81. 1. Jones, 300. 1. Sid. 437. 1. Vent. 91. 2. Saund. 164. 1. Lev. 295. N. L. 203. 416. 1. Leon. 2. 3. Co. 2. Plow. 193. 431. 3. Mod. 230. 4. Mod. 321. 6. Mod. 64. 12. Mod. 540. 1. Salk. 356. See the caſe of Smartle v. Penhallow, 2. Ld. Raym. 994. Plowd. 31. Com. Dig. "Pleader" (C 66.).

NORTH, *Chief Juſtice*. Though *Anthony* were alive, the deviſee of *Trevill* could not diſtrain for the heriot, for that the reſervation is to him and his aſſigns; and although the election to have the heriot of forty ſhillings be given to the leſſor, his heirs or aſſigns, yet that will not help the fault in the reſervation.

A leaſe reſerving a heriot, or 40s. at the election of the leſſor and his aſſigns, determines on his death.—Co. Lit. 47. Owen, 9. Cro. Eliz. 217. 2. Roll. Abr. 450. 12. Co. 36. Cro. Car. 290. 1. Vent. 162.

ELLIS, *Juſtice*. There is another fault in the pleading; for it is pleaded that *Trevill* made his will in writing; but it is not ſaid, that he died ſo ſeiſed; for if the eſtate of the deviſor were turned to *a right* at the time of his death, the will could not operate upon it.

Pleading.

Alſo

Notice. Cowp. 30.

Alſo it is ſaid, That the avowant made his election, and that the plaintiff *habuit notitiam* of his election; but it is not ſaid by whom notice was given.—For theſe cauſes, judgment was given for the plaintiff.

Quære, If a heriot be given after the deaths of *A.* *B.* and *C.* *ſucceſſive*, whether it be *due* if *B.* dies before *A.* and *C.*

It was urged, likewiſe, againſt the avowant, That no heriot could be due in this caſe, becauſe *Joan* did not die firſt, but the courſe of ſucceſſion is interrupted; and that a heriot not being due of common right, the words of reſervation ought to be purſued.—But as to this THE COURT delivered no opinion.

Caſe 5. Ognell *againſt* Lord Arlington, Guardian of Sir John Jacob.

Eſtates held by *elegit* are within the 4. *Hen.* 7. c. 24.; and if the lands be extended, may be barred by fine and non-claim. Ante, 4. 2. Venſ. 333. 1. Show. 56. 40. 2. Skin. 260. 1. Ch. Caſ. 268. Gilb. Eq. Rep. 17. 108. 11. Mod. 103. 210. 12. Mod. 32. 2. Vern 189. 368. 662. Abr. Eq. 256. 1. Peer. Wms. 130. 520. 2. Peer. Wms. 127. 146. 3. Peer. Wms. 310. 372. A *naked power* has been held not to be barred by a *fine*, becauſe ſome *eſtate* muſt be deveſted or gained by *wrong* to make a fine operate. Willis *v.* Sherrat, in chancery, 24. February, 1739, *reported* 1. *Atkins*, 474.

THE COURT, UPON A TRIAL AT BAR, delivered for law to *the jury*, That if there be tenant by *elegit* of certain lands, and a fine be levied of thoſe lands, and five years with non-claim paſs, the intereſt of the tenant by *elegit* is bound, according to *Saſlyn's Caſe* (*a*); otherwiſe, if the land had not been actually *extended*. ALSO, That if an inquiſition upon an *elegit* be found, and the party before entry has the poſſeſſion, a fine, with non-claim, ſhall bar his right; for before actual entry, he may have ejectment or treſpaſs; and ſo not like to an *intereſſe termini* (*b*).

(*a*) 5. Co. 124. Cro. Jac. 60.

(*b*) By 29. Car. 2 c. 3. ſ. 14. & 15. the day of the month, and the year, in which *any judgment* is ſigned in the courts at Weſtminſter, ſhall be ſet down on the record, and alſo be entered on the margin of the roll; and ſuch judgments as againſt purchaſors *bona fide* for valuable conſiderations, of lands, tenements, or hereditaments, to be charged thereby, ſhall be judgments only from the time they are ſo *ſigned*. Alſo by 4. & 5. Will. & Mary, c. 20. for the greater ſecurity of purchaſors, all judgments by confeſſion, &c. ſhall be docketed; and no judgment not docketed ſhall affect any lands or tenements as to purchaſors or mortgagees, or have any preference againſt heirs, executors, or adminiſtrators.

Caſe 6. * Barry *againſt* Trebeſwycke.

A perſon may ſue for a *penſion* by preſcription, either in the ſpiritual court or at common law.

IF a parſon have *a penſion* by preſcription, he may either bring an action at the common law, or commence a ſuit in the ſpiritual court; but if he bring a writ of annuity at the common law, he can never after ſue in the ſpiritual court, for that his election is determined.

1. Vent. 3. 265. 120. 1. Sid. 146. 1. Keb. 523. 562. Co. Lit. 146. 2. Inſt. 491. Cro. Eliz. 675. Cro. Jac. 666. 12. Mod. 260. 397. 416. 1. Peer. Wms. 657. 660. 2. Ld. Ray. 313. 579. 1. Stra. 424.

Wakeman

Wakeman *againſt* Blackwell.

Caſe 7.

QUARE IMPEDIT. The defendant pleaded a recovery in this manner, *viz.* That *John Wakeman*, grandfather to the plaintiff, was ſeiſed in fee of the manor, to which, &c. and that a *præcipe* was brought againſt one *Prinne* and *Philpots*, "*adtunc tenentes liberi tenementi, &c.*" who appeared and vouched *John Wakeman*, *&c.* and that this recovery was to the uſe of *J. S.* under whom the defendant claims.

If a common recovery be pleaded, "that "*A.* being "ſeiſed *in fee* a "*præcipe* was "brought "againſt *B* "and *C. adtunc* "*tenentes liberi* "*tenementi*," or without ſhewing how they had the freeholds, it is bad.

STRODE, *for the defendant.* It is not neceſſary that the tenant, in a common recovery, ſhould have a freehold, at the time of the purchaſe of the writ; if he have a freehold at the time of the return, it ſufficeth: 7. *Edw.* 3. *pl.* 42. 7. *Edw.* 3. *pl.* 70. *Aſſ. of Nov. Diſſ.* 43. *Edw.* 3. *pl.* 21. In theſe authorities the perſon againſt whom the *præcipe* is brought, comes in by right, after the purchaſe, and before the return of the writ. But in 26. *Edw.* 3. *pl.* 68. there is an example, where the tenant to the *præcipe* comes in by *tort*: but there is this difference; if he come to the land by his own act, be it by right or by wrong, there he makes the writ good: otherwiſe if he come to it by act of law. 8. *Edw.* 3. *pl.* 22. a. *Formedon*, 25. *Hen.* 6. *pl.* 4. The reaſon why you ſhall not abate the plaintiff's writ by your own act, is, becauſe you cannot give him a better. The demandant here is eſtopped to ſay, that there was not a tenant to the *præcipe* in this recovery; for the writ is but abatable, if brought againſt one that is not tenant: and as long as it ſtands not abated, but is pleaded to, &c. it ſhall conclude all that are parties and privies, and all claiming under them: 34. *Edw.* 3. *Fitz Abr. tit.* "*Droit*," 39. Here is in our caſe an * eſtoppel, with a recompence. *Wakeman*, the grandfather, who was the firſt vouchee in this recovery, might have counterpleaded the lien, and extorted the warranty; but having vouched over, he has paſt that advantage, and is concluded, being made a party by voucher. This being a common recovery, the Court will do all they can to make it good. A fine is levied by *dedimus poteſtatem* by huſband and wife. The commiſſioners did not return the examination of the wife; and that is the diſcriminating difference upon which depends, Whether the wife ſhall be bound by the fine, or not? 15. *Edw.* 4. 28. a. *Lit. Sect.* 670. 6. *Edw.* 3. 22. a. The Court muſt needs in this caſe intend, that *Prinne* and *Philpots* came in by conveyance, becauſe *Wakeman* came in upon the voucher, which he would not have done, if there had not been a lien.—He cited *Lincoln College Caſe* (*a*), *Griffin v. Stanhope* (*b*), and *Duncomb v. Wingfield* (*c*).

S. C. 2. Mod. 70. Hob. 262. Lutw. 1549. Piggot, 30. Moor, 691. Noy, 126. 3. Co. 59. 1. Show. 347. 12. Mod. 45. 124. 1. Ld. Ray. 202. 229. Co. Litt. 203. b. note (1).

* [219]

See the caſe of Lewis v. Witham, Strange, 184. 1. Wilſ. 48.

PEMBERTON anſwered, That *tunc tenens* is a ſufficient averment in the pleading of a recovery, which is favoured in law; but is not good alone, when in the ſame ſentence a matter is ſet forth that is inconſiſtent with it, and plainly contradictory, as in this caſe.

(*a*) 3. Co. 48. 2. Ander. 31.
(*b*) Cro. Jac. 454.
(*c*) Hob. 354. 2. Roll. Rep. 447. Winch. Ent. 408.

WAKEMAN *againſt* BLACKWELL.

And of that opinion was THE COURT. The caſe of *Duncomb v. Wingfield*, they ſaid, was upon a ſpecial verdict; where many things may be intended, which ſhall not be ſo in pleading: and in *Lincoln College Caſe*, the writ is ſaid to be brought againſt one *Edward Chamberlain* in one part of the record, and the mother is ſaid to be tenant in another part of the record, and by the other party; but here in the ſame ſentence, *uno flatu*, there is a flat contradiction (*a*).

(*a*) In S. C. 2. Mod. 70. it is ſaid, that the Court inclined that it was not well pleaded, but delivered no judgment.

Caſe 8.

Burrow *againſt* Haggett.

A FORMEDON *in deſcender*, ſtating that the right deſcended to the demandant, as brother and heir of the donee, is good, without alledging that the donee died without iſſue.

FORMEDON IN THE DESCENDER. The defendant pleaded in *abatement* of the count, and took theſe exceptions:

FIRST, That the demandant declares, that the right deſcended to him after the death of *Leonard*, as brother and heir to *Leonard*, and ſon and heir of the donee; but does not alledge that *Leonard* died without iſſue (*a*). In ancient Regiſters (*b*) the clauſe is, *eò quòd* the iſſue died without iſſue; * and in *the Annals* of *Edward the Fourth* (*c*) it is ſaid by CATESBY, *Juſtice*, That where a man entitles himſelf as heir, he muſt ſhew how he is heir.

* [220]

S. C. 2. Mod. 94. S. C. 3. Lev. 55. Hob. 51. Dyer, 216. N. Lutw. 304. 5. Mod. 17. 10. Mod. 140. 362. 367. 1. Ld. Ray. 202. See Booth on Real Actions, 155.

SEYSE, *contra*. The precedents are on our ſide; and the difference is betwixt a formedon in the deſcender, and a formedon in the remainder, or reverter. In the former they do not mention the dying without iſſue of him after whoſe death they claim; for the count there is in effect only to ſet out their pedigree; but in a formedon in the remainder, or reverter, it is otherwiſe; 39. *Edw.* 3. 27. *Old Bk. of Ent.* 339. *pl.* 3. *Co. Lit.* "*Mandevil's Caſe*," 26. b. *In the Year Book of* 7. *Hen.* 7. *fol.* 7. b. our caſe is put in expreſs terms: the exception taken to the count there by *Keble*, is the ſame that is taken to ours here; and there it is over-ruled.

NORTH, *Chief Juſtice*. I have looked into precedents, and find the count, in this caſe, according to them. It is a plain and reaſonable difference betwixt a formedon in the deſcender, and a formedon in the remainder, or reverter: nor could the demandant be brother and heir to *Leonard*, if *Leonard* had left children, &c.

Part of the words of a *writ* may be inſerted in a *declaration* with an *&c.* as ſignificant of the whole ſentence.

1. Sid. 187. Cro. Car. 341. 348.

ANOTHER EXCEPTION was, That the demandant does not ſet forth that he was ſon and heir of *John*, begotten on the body of *Jane* his wife; for it was a gift in ſpecial tail.—But this was over-ruled; for in the writ that is ſet forth, and in the declaration, after the words "*filio et hæredi prædict.* JOHANNIS," came an "&c." which "&c." let the words of the writ into the count; and ſo it was held good. THE PROTHONOTARY ſaid, That the forms of counts were accordingly. And judgment was given to anſwer over, *niſi cauſa*, *&c.*

(*a*) See Buckmere's Caſe, 8. Co. 88. Brownl. 274.
(*b*) Co. Ent. 254. b. Raſt. Ent. 365.
(*c*) Year-Book 9. Edw. 4. p. 36.

MICHAELMAS TERM,

The Twenty-Eighth of Charles the Second,

IN

The Common Pleas.

Monday, October 23, 1676.

Sir Francis North, *Knt. Chief Juſtice.*
Sir Robert Atkins, *Knt.*
Sir Hugh Wyndham, *Knt.* } *Juſtices.*
Sir William Scroggs, *Knt.*
Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

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* Memorandum.

MR. JUSTICE ELLIS being removed from his office during the Trinity vacation, SIR WILLIAM SCROGGS, one of the king's ſerjeants, was ſworn in his place on the firſt day of this Term, and took his ſeat on the bench the *Wedneſday* following. Freem. 212.

Blythe *againſt* Hill.

Caſe 9.

DEBT upon an obligation for the payment of money at a day certain. The defendant pleaded, That the plaintiff, being deſirous to have the money paid before the day, took another bond for the ſame ſum payable ſooner, and that this was in full ſatisfaction of the former bond: upon this plea the plaintiff took iſſue, and it was found againſt him.

To debt on bond the defendant cannot plead another bond given in ſatisfaction; but if the plaintiff take iſſue, and it is found againſt him, the defendant ſhall have judgment.—S. C. poſt. 225. S. C. 2. Mod. 136. 3. C. 2. Danv. 115. 6. Co. 44. Cro. Eliz. 716. Cro. Car. 85. Cro. Jac. 579. 100. Hob. 86. 2. Keb. 804. 3. Lev. 55. Litt. Rep. 58. 1. Brownl. 47. 71. Cowp. 128.

BLYTHE *againſt* HILL.

MAYNARD, *Serjeant*, moved, That notwithſtanding this verdict, judgment ought to be given for the plaintiff, for that the defendant by his plea has confeſſed the action: and to ſay, that another bond was given in ſatisfaction, is nothing to the purpoſe: *Hob.* 68.: ſo that upon the whole it appears, that the plaintiff has the right, and he ought to have judgment: *Cro. Jac.* 139. 8. *Co.* 93. a.

See S. C. 2. Mod. 137.

THE COURT gave a rule to ſhew cauſe why the plaintiff ſhould not have judgment.

Caſe 10.

Savill *againſt* the Hundred of ———.

A declaration upon the ſtatute of HUE AND CRY is good after verdict, although it does not ſtate that the robbery was in the high-way.

THE plaintiff in an action upon the ſtatute of *Winton* had a verdict; and it was moved in arreſt of judgment, That the felonious taking is not ſaid to be in the high-way: *Cro. Jac.* 469. 675.

NORTH, *Chief Juſtice*. An action lies upon the ſtatute of *Winton*, though the robbery be not committed in the high-way:—to which THE COURT agreed:—and THE PROTHONOTARIES ſaid, that the entries were frequently ſo. *Per quod, &c.*

Cro. Car. 267. 3. Mod. 258. 8. Mod. 8, 9. 11. Mod. 8. 12. Mod. 54. Show. 60. Carth. 71. Comyns, 345. 829. 1. Peer. Wms. 412. 437. Salk. 614. 2. Ld. Ray. 816. 2. Stra. 406.

* [222]

Caſe 11.

* Calthrop *againſt* Philips.

An action lies againſt a ſheriff, though out of office, for not delivering a writ of *ſuperſedeas* to his ſucceſſor, by reaſon of which the plaintiff's goods are taken in execution.

ONE *J. S.* had recovered a debt againſt *Calthrop*, and procured a writ of execution to *Philips*, the then ſheriff of *D.*; but before that writ was executed, *Calthrop* procured a *ſuperſedeas* to the ſame *Philips*, who, when his year was out, delivered over all the writs to the new ſheriff, ſave this *ſuperſedeas*; which not being delivered, *J. S.* procures a new writ of execution to the new ſheriff: upon which the goods of *Calthrop* being taken, he brings his action againſt *Philips* for not delivering over the *ſuperſedeas*.

S. C. 2. Mod. 217. Moor, 688. 2. Leon. 54. 8. Mod 193. 247. 324 Cawp. 423. Dougl. 465. 2. Term Rep. 1.

After a verdict for the plaintiff, it was moved in arreſt of judgment, That the action would not lie, for that the ſheriff is not bound to deliver over a *ſuperſedeas*. FIRST, Becauſe it is not a writ that has a return. SECONDLY, Becauſe it is only the ſheriff's warrant for not obeying the writ of execution.—The prothonotaries ſaid, that the courſe was to take out a new writ to the new ſheriff.

STRODE, *Serjeant*, argued, That the *ſuperſedeas* ought to be delivered over; becauſe the king's writ to the old ſheriff is, "*quòd com. prædict. cum pertinentiis, unà cum retulis, brevibus, memorandis et omnibus officium illud tangentibus, quæ in cuſtodiâ ſuâ exiſtunt, liberet,*" *&c.* and he cited *Reg.* 295. and 3. *Co.* 72. *Weſtby's Caſe*. Beſides, the *ſuperſedeas* is for the defendant's benefit; and there is no reaſon why the *capias* ſhould be delivered over, which is for the plaintiff's benefit, and not the *ſuperſedeas*, which

CALTHROP *againſt* PHILIPS.

which is for the defendant's: and he ſaid an action will lie for not delivering over ſome writs to the new ſheriff, though thoſe writs are not returnable, as a *writ of eſtrepement*.

THE COURT inclined to his opinion; but it was adjourned to a further day; on which day it was moved again, and the judgment was affirmed *(a)*.

(*a*) By 20. Geo 2. c. 37. "For the "eaſe of ſheriffs with regard to the return "of proceſs, it is enacted, that all ſheriffs "ſhall, at the expiration of their office, "turn over to the ſucceeding ſheriff, "by indenture and ſchedule, all ſuch "writs and proceſs as ſhall remain in "their hands unexecuted, who ſhall "duly execute and return the ſame: "and in caſe any ſheriff ſhall refuſe or "neglect to turn over ſuch proceſs in "manner aforeſaid, every ſheriff ſo "neglecting or refuſing ſhall be liable "to make ſatisfaction by damages and "coſts to the party aggrieved as he, ſhe, "or they, ſhall ſuſtain by ſuch neglect "or refuſal. But no ſheriff ſhall be "liable to be called upon to make a "return of any writ or proceſs, unleſs "he be required ſo to do within ſix "months after the expiration of his "office."

* Baſcawin and Herle *againſt* Cook.

Caſe 12.

THOMAS COOK granted *a rent-charge* of two hundred pounds a-year to *Baſcawin* and *Herle* for the life of *Mary Cook*, HABENDUM to them their heirs and aſſigns, *ad opus et uſum* of *Mary*; and in the indenture covenanted to pay the rent *ad opus et uſum* of *Mary*.

A. grants a rent-charge to *B* for the life of *C. habendum* to *B.* his heirs and aſſigns, to the uſe of *C.* with a covenant in the indenture to pay it to *the uſe* of *C.* If the rent be not *paid to B. to the uſe of C. B* may maintain *covenant* againſt *A.*; for though the rent-charge is executed in *C.* by the 27. *Hen.* 8. c. 10. yet the covenant being collateral remains undiſcharged with.

Baſcawin and *Herle* upon this bring an action of covenant, and aſſign the breach in not paying the rent to themſelves, *ad opus et uſum* of *Mary*. The defendant demurs:

FIRST, Becauſe the words in which the breach is aſſigned, contain a negative pregnant.—BALDWIN, *for the plaintiff*. We aſſign the breach in the words of the covenant.—CURIA *accord*.

SECONDLY, Becauſe the plaintiff does not ſay that the money was not paid to *Mary*; for if it were ſo, it would ſatisfy the covenant.

THIRDLY, This rent-charge is executed to *Mary* by the ſtatute 27. *Hen.* 8. c. 10. of Uſes, and ſhe ought to have diſtrained for it: for ſhe having a remedy, the plaintiffs, out of whom the rent is transferred by the ſtatute, cannot bring this action.

Hereupon two queſtions were made: FIRST, Whether this remedy by action of covenant be transferred to *Mary* by the ſtatute 27. *Hen.* 8. c. 10. of Uſes or not?—and, SECONDLY, If not, whether the covenant were diſcharged, or not?

NORTH, *Chief Juſtice*, and WYNDHAM. When the ſtatute transfers an eſtate, it transfers together with it ſuch remedies only, as by law are incident to that eſtate, and not collateral ones.

ATKINS *accordant*.—There is a clauſe in the ſtatute of 27. *Hen.* 8. c. 10. which gives the *ceſtui que uſe* of a rent all ſuch remedies as he would have had, if the rent had been actually and really granted to him: but that has place only where one is ſeiſed

S. C. 2. Mod. 138. 9. Co. 61. 2. Lev. 26. 1. Vent. 175. 12. Mod. 45. 166. 171. 394. 384. 400. 3. Term Rep. 393.

BASCAWIN AND HERLE *againſt* COOKE.

of lands in truſt that another ſhall have a rent out of them; not where a rent is granted to one to the uſe of another. They agreed alſo that the covenant was not diſcharged; and gave judgment for the plaintiff, *niſi*, &c.

* [224]

Caſe 13.

* Higden *againſt* Whitechurch, Executor of Dethicke.

If one of two obligors be ſued to outlawry, and afterwards judgment and execution is had on the ſame bond againſt the other obligor, the outlaw cannot be relieved by *audita querela*, but muſt ſue out his *pardon*; for the outlawry may be pleaded in diſability.

AUDITA QUERELA. The plaintiff declares, That he and one *Prettyman* became bound to the teſtator *Dethicke* for the payment of a certain ſum: that in an action brought againſt him he was outlawed: that *Dethicke* afterward brought another action upon the ſame bond againſt *Prettyman*, and had judgment: that *Prettyman* was taken by a *capias ad ſatisfaciendum*, and impriſoned, and paid the debt, and was releaſed by *Dethicke's* conſent. Upon this matter the plaintiff here prays to be relieved againſt this judgment and outlawry. The defendant, *proteſtando* that the debt was not ſatisfied, pleads the outlawry in diſability. The plaintiff demurs.

BALDWIN, *for the plaintiff*. *Non datur exceptio ejus rei, cujus petitur diſſolutio*. He reſembled this to the caſes of bringing a writ of error or attaint, in neither of which outlawry is pleadable.

Ante, 111. 170. 6. Edw. 4. pl. 6. 7. Hen. 4. pl. 39. 7. Hen. 6. pl. 44. Jenk. 37. 2. Mod. 49. 8. Co. 141. Hob. 2. 1. Sid. 43. Co. Lit. 128. 384. 5. Co 86. Cro. Eliz. 225. Cro. Jac. 425. 2. Bulſt. 97.

SEYSE, *contra*. Outlawry is a good plea in *audita querela*. This caſe is not within the maxim that has been cited: a writ of error and attaint is within it; for in both them the judgment itſelf is to be reverſed. But in an *audita querela* you admit the judgment to be good, only upon ſome equitable matter ariſing ſince, you pray that no execution may be upon it.

THE COURT. If the judgment had been erroneous, and a writ of error had been brought, the outlawry, which was but a ſuperſtructure, would fall by conſequence; but an *audita querela* meddles not with the judgment: the plaintiff here has no remedy but to ſue out his charter of pardon.

12. Mod. 400.

* [225]

Caſe 14.

* Blythe *againſt* Hill.

To debt on bond againſt the heir of the obligor, the defendant may plead another bond given in ſatisfaction by the adminiſtrator of the obligor.

THE caſe being moved again, appeared to be thus: The plaintiff brought an action of debt upon a bond againſt the defendant as heir to the obligor. The defendant pleaded, that the obligor, his anceſtor, died inteſtate, and that one *J. S.* had taken out letters of adminiſtration, and had given the plaintiff another bond in full ſatisfaction of the former. Upon this, iſſue being joined, it was found for the defendant.

It was ſaid for him, that one bond might be taken in ſatisfaction of another; and *Co. Lit.* 212. b. 30. *Edw.* 1. 23. *Dyer* 29. were cited.

S. C. ante, 221. S. C. 2. Mod. 136. Hob. 68. 1. Brownl. 74. Cro. Eliz. 697. Co. Lit. 232. 2. Vern. 62. 10. Mod. 224. 306. 12. Mod. 86. 248. 537. 1. Ld. Ray. 60. 122. 566. 1. Stra. 426. 573. 615. 1. Peer. Wms. 324. 2. Peer. Wms. 343. 553. (614). (616). 3. Peer. Wms. 225. 245.

NORTH,

NORTH, *Chief Juſtice.* If the ſecond bond had been given by the obligor himſelf, it would not have diſcharged the former: but here, being given by the adminiſtrator, ſo that the plaintiff's ſecurity is bettered, and the adminiſtrator chargeable *de bonis propriis*, I conceive it may be a ſufficient diſcharge of the firſt bond.

BLYTHE *againſt* HILL.

WYNDHAM, *Juſtice.* I am of the ſame opinion; for otherwiſe the adminiſtrator and heir might both be charged.

SCROGGS *accord.*

ATKINS, *Juſtice.* There are many authorities in the point; and all directly, that one bond cannot be given in ſatisfaction of another; as in *Manhood v. Cluck* (*a*), *Norwood v. Gripe* (*b*), and many others (*c*): yet I hold that judgment ought to be given for the defendant; for though it be an impertinent iſſue, yet being found for him, he ought by the ſtatute of 32. *Hen.* 8. c. 30. to have judgment; but if no iſſue at all had been joined, it would have been otherwiſe (*d*). SERJEANT MAYNARD cites the Year Book of 9. *Hen.* 6. but that caſe was before the ſtatute: ſo I ground my judgment upon that point.

NORTH, *Chief Juſtice.* I took it, that *unapt* iſſues are aided by the ſtatute, but not *immaterial iſſues*; and ſo ſaid SCROGGS.

THE COURT gave judgment for the defendant, *niſi*, &c.

(*a*) Cro. Eliz. 716.
(*b*) Cro. Eliz. 727.
(*c*) Hob. 69. 2. Bac. Abr. 24. 452. 6. Co. 44. 1. Burr. 9. Cowp. 47.
(*d*) See Pigot *v.* Pigot, Cro. Jac. 44.

* Southcot *againſt* Stowell.

Caſe 15.

Hilary Term, 25. & 26. *Car.* 2. *Roll* 1303.

COVENANT FOR NON-PAYMENT OF MONEY. The caſe was thus, *viz. Thomas Southcot* had iſſue two ſons, *Sir Popham* and *William*; and in conſideration of the marriage of his ſon *Sir Popham*, covenanted to ſtand ſeiſed to the uſe of *Sir Popham*, and the heirs males of his body; and for default of ſuch iſſue, to the uſe of the heirs males of his own body, the remainder to his own right heirs. *Sir Popham* dies, leaving iſſue *Edward* his ſon, and four daughters: then *Thomas* the father died; and then *Edward* died without iſſue.

A. having two ſons, *C.* and *D.* covenants to ſtand ſeiſed to the uſe of *C.* in *tail male ſpecial*, and for want of ſuch iſſue to the heirs male of *his own body*; and for want of ſuch iſſue to *his own right heirs* for ever. *C.* dies, leaving iſſue a ſon *E.* and a daughter. *A.* dies. Then *E.* dies without iſſue. The eſtate veſts in *E.* as *a purchaſor*; and after his death his uncle *D.* takes it by *diſcent*, as heir male of the body of *A.*—S. C. poſt. 237. S. C. Freem. 216. S. C. 2. Mod. 207. S. C. 3. Keb. 704. S. C. 2. Danv. 556. Ante, 159. 175. Dyer, 156. Cro. Eliz. 109. Co. Lit. 26. b. 220. a. 2. Leon. 25. Cro. Car. 24. *Sed vide* the caſe of Wills *v.* Palmer, 5 Burr. 2615. 2. Black. Rep. 687. Fearn. C. R. 54. to 62.; and Mr. Hargrave's note (3), Co. Lit. 24. b. Prec. in Ch. 54. Dougl. 501. 1. Peer. Wms. 622.

The queſtion was, Whether *Sir Popham's* daughters or *William* had the better title?

Two points were made: FIRST, Whether the limitation of the remainder to the heirs males of the body of the covenantor, were good in its creation, or not?

SOUTHCOT *against* SOUTHWELL.

SECONDLY, Admitting it to be good originally, Whether it could take effect after the death of *Edward*; he leaving ſiſters, which are general heirs to the covenantor?

NORTH, *Chief Juſtice*, WYNDHAM and ATKINS, *Juſtices*, upon admiſſion of the firſt point, were of opinion for *William*; and that he ſhould have an eſtate, not by *purchaſe*, but by *deſcent* from *Edward*: for after the death of the father, both the eſtates in tail were veſted in him; and he was capable of the remainder by purchaſe; and being once well veſted in a purchaſor, the eſtate ſhall afterwards run in courſe of deſcent. SCROGGS, *Juſtice*, doubted.

But they all doubted of the firſt point, and would adviſe (*a*).

(*a*) Vide poſt. 237, 238.

Caſe 15*.

In what caſe a *ſerjeant at law* may be returned as *a juror*.

S. C. 2. Mod. 182. 6. Co. 53. Co. Lit. 156. 2. Stra. 1023.

The Counteſs of Northumberland's Caſe.

IT was ſaid by the Juſtices in this caſe, That if *a knight* be but returned on a jury, when *a nobleman* is concerned, it is not material whether he appear and give his verdict, or no.—ALSO, That if there be no other knights in the county, *a ſerjeant at law* that is a knight may be returned, and his privilege ſhall not excuſe him (*a*).

(*a*) But now by 24. Geo. 2. c 18. ſ. 4. on account of the great delay which frequently happened in trials where a peer or lord of parliament was party, by reaſon of challenges to the arrays of jurors, for want of *a knight* being returned on ſuch panels, IT IS ENACTED, "that no challenge ſhall "be taken to any panel of jurors for "want of *a knight's* being returned in "ſuch panel, nor any array quaſhed by "reaſon of any ſuch challenge."

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Caſe 16.

In debt on bond to pay ſo long as he continued in office; if the defendant plead, that it was granted for the life of *A.* and paid during the life of *A.* the plaintiff may reply, that he did not enjoy it for, and pay during, the life of *A.* &c.; but he muſt aſſign a breach that he did not pay.

* Gayle *againſt* Betts.

DEBT UPON A BOND. The defendant demands *oyer* of the bond and condition; which was to pay forty pounds *per annum* quarterly, ſo long as the defendant ſhould continue Regiſter to the *Archdeacon of Colcheſter*; and pleads, That the office was granted to *A. B.* and *C.* for their lives; and that he enjoyed the office ſo long as they lived, and no longer; and that ſo long he paid the ſaid forty pounds quarterly. The plaintiff replies, That the defendant did enjoy the office longer, and had not paid the money. The defendant demurs, ſuppoſing the replication was double.

PER CURIAM. The replication is not *double*; for the defendant cannot take iſſue upon the non-payment of the money; that would be *a departure* from his plea in bar: ſo if upon a plea of "*nullum fecit arbitrium*," the plaintiff in his replication ſet forth an award and a breach, the defendant cannot take iſſue upon the breach, for that would be an implicit confeſſion of what he had denied before.

S. C. 3. Keb. 813. S. C. 3. Salk. 142. Poſt. 289. Hob. 14. 198. 233. 1. Saund. 103. Comyns, 115. 1p. Mod. 257. 257. 349. 280. 326. 335. 12. Mod. 54. 92. 1. Ld. Ray. 30. 78. 234. 693. 2. Ld. Ray. 1449. Stra. 227. 3. Wilſ. 11. 267. 1. Burr. 574. 2. Burr. 772. Cowp. 578.

NORTH,

NORTH, *Chief Juſtice.* If the defendant plead, that he did not exerciſe the office beyond ſuch a time, till which time he paid the money, the plaintiff may take iſſue, either upon the payment till that time, or rely upon the continuance: but if he do the latter, he muſt ſhew a breach; for the continuance is in itſelf no breach.

GAYLE *againſt* BETTS.

Ellis *againſt* Yarborough, Sheriff of Yorkſhire. Caſe 17.

ACTION UPON THE CASE againſt a ſheriff for an eſcape. The plaintiff declares, That one *G.* was indebted to him in two hundred pounds; and that the defendant took him upon a *latitat* at the plaintiff's ſuit, and afterward ſuffered him to eſcape. The defendant pleads the ſtatute of 23. *Hen.* 6. c. 10. and that he let *G.* out upon bail, according to the ſaid ſtatute; and that he had taken reaſonable ſureties, *A.* and *B.* perſons having ſufficient within the county. The plaintiff replies, and traverſes, *abſque hoc* that the defendant took bail of perſons having ſufficient within the county. The defendant demurs.

The clauſe of the ſtatute 23. *Hen.* 6. c. 10. which authoriſes ſheriffs to diſcharge priſoners, "upon reaſonable ſureties of ſufficient perſons having ſufficient within the county," is to be conſtrued for the benefit of ſheriffs; and therefore no action lies for taking ſureties that are inſufficient, or do not inhabit within the county: but if he do not bring in the body at the return of the writ, or ſuffer him to go at large without authority, he is liable to an action.

SKIPWITH. The ſheriff is compellable to take bail. If he take inſufficient bail, the courſe is for the Court to amerce the ſheriff, and not for the party to have an action upon the caſe (*a*). If the ſheriff take no bail, an action lies againſt him; and all actions brought upon this ſtatute are founded upon this ſuggeſtion (*b*). But if he take inſufficient bail, it is at his own peril, and no action lies; the ſheriff is judge of the bail, and the ſum is at his diſcretion (*c*); and ſo are the number of the perſons; he may take one, two, or three, as he pleaſeth (*d*). Beſides, the traverſe is pregnant; for it implies, that the perſons have ſufficient out of the county; and the ſheriff is not bound to take bail only of perſons having ſufficient within the county.

* [228]

SERJEANT BARRELL, *contra.*—But THE COURT not agreeing in their opinions upon the matter of law, it was put off to the next Term to be argued.

BALDWIN, *for the defendant.* The ſheriff is compellable to let him to bail, and is judge of the ſufficiency of the ſureties. The ſtatute was made for the priſoner's benefit; for the miſchief before was, that the ſheriff not being compellable to bail him, would extort money from him to be bailed: and the word "ſufficient" is added in favour of the ſheriff; and ſo are the words "within the county." The ſheriff is not compellable to aſſign

S. C. Freem. 219. S. C. 2. Mod. 177.

Ante, 57. Poſt. 239. 244. Cro. Eliz. 808. 852. 862. Noy, 39. 1. Sid. 96. 2. Saund. 59. 2. Mod. 83. 10. Mod. 288. 12. Mod. 385. Comyns, 422. 554. 1. Ld. Ray. 722. 1. Peer. Wms. 687. held, that an action lies againſt the ſheriff for taking inſufficient pledges in replevin, Hilary Term, 13. Geo. 2. B. R. Sir William Rouſe v. Paterſon, 16. Viner's Abr. 399. c. 4. See alſo Cro. Eliz. 624. Cro. Jac. 286. 1. Roll. Abr. 807. Moor, 428. 1. Ld. Ray. 425. 1. Salk. 99. 6. Mod. 122. 1. Term Rep. 418. 2. Term Rep. 172.

(*a*) Cro. Eliz. 852. Noy, 39.
(*b*) Cro. Eliz. 460*. Moor, 428. Cro. Jac. 280.
(*c*) Cro. Jac. 286.
(*d*) Cro. Eliz. 808. 1. Sid. 96. 10. Co. 102. Salk. 97. Impey's Sheriff, 124.

the

ELLIS *againſt* YARBOROUGH.

the bail-bond (*a*); and then, if the plaintiff cannot have the ſecurity given by the defendant for his appearance, it is all one to him, whether it be good or no.

1. Sid. 23. 2. Mod. 84. 1. Salk. 99.

STRODE, *contra*. Why muſt the ſheriff always aver that he has taken ſufficient ſureties, if their ſufficiency be not material? Why is an action allowed to lie, if the ſheriff take no ſureties at all, ſince, according to my brother's opinion, the party has no intereſt in them? If the law be as they argue, the ſtatute has left the plaintiff in a worſe condition than he was at the common-law; for it has deprived him of the remedy he had before; and the amercements belong not to him, but to the king.

2. Saund. 60. 2. Term. Rep. 174.

ATKYNS, *Juſtice*. The ſufficiency of the bail is not material; it is only for the ſheriff's own ſecurity. If he take no bail at all, an action lies againſt him, for then he does not act by colour of this law. The ſtatute is not advantageous to * the plaintiff at all, unleſs the ſheriff let go the priſoner without taking bail; and then he muſt render treble damages.

* [229]

And, by the opinion of THE WHOLE COURT, judgment was given for the defendant.

(*a*) But now by 4. & 5. Ann. c. 16. ſ. 20. "The ſheriff, at the requeſt and "coſts of the plaintiff, ſhall aſſign the "bail-bond to the plaintiff, by indorſing "the ſame, and atteſting it under his "hand and ſeal, in the preſence of two "or more credible witneſſes, which "may be done without any ſtamp, "provided the aſſignment ſo indorſed be "duly ſtamped before any action be "brought thereupon: and if the bail-"bond be forfeited, the plaintiff, after "ſuch aſſignment, may bring an action "thereupon in his own name, and the "Court give ſuch relief to the plaintiff "and defendant in the original action, "and to the bail upon the ſaid bond, as "is agreeable to juſtice, &c."

Caſe 18.

Moor *againſt* Field.

A *modus* to pay full tithe for all ſheep on the ground on a particular day, in lieu of tithe for the reſt of the year, is bad. Ante, 216.

A CUSTOM was alledged, That all perſons, in a pariſh, that had ſheep upon the ground on *Candlemas-day*, ſhould be diſcharged of tithes of all ſheep that ſhould be upon the ground after in that year, upon payment of full tithes for all the ſheep that were there upon that day:—and this was adjudged an unreaſonable cuſtom. SERJEANT TURNER argued for it, and cited 2. *Roll. Abr.* 647, 648.

1. Roll. Abr. 648. Cro. Eliz. 446. Carthew, 461. Fitzg. 55. 12. Mod. 497. 1. Ld. Ray. 359. 677. 2 Ld. Ray. 1558. 2. Strange, 1224. Bunb. 307. 3. Com. Dig. "Diſmes" (E 15.). Doug. 204. 2. Brown's Caſes in Chan. 161.

HILARY

HILARY TERM,

The Twenty-Eighth and Twenty-Ninth of Charles the Second,

IN

The Common Pleas.

Sir Francis North, *Knt. Chief Juſtice.*

Sir Robert Atkyns, *Knt.*
Sir Hugh Wyndham, *Knt.* } *Juſtices.*
Sir William Scroggs, *Knt.*

Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

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* Strode *againſt* the Biſhop of Bath and Wells, and Sir George Horner and Maſters. Caſe 19.

QUARE IMPEDIT. The plaintiff entitles himſelf by virtue of a grant of the next avoidance made by *Sir George Horner*; and counts, that *Sir George* was ſeiſed in fee of the manor of *Dowling*, to which the advowſon was appendant, and preſented one *Harding*, who was admitted, inſtituted, &c. and that then he granted the next avoidance to the plaintiff; and that *Harding* died, and it belongs to him to preſent.

In *quare impedit*, if the plaintiff alledges that *A.* was ſeiſed in fee of ſuch a manor, to which the advowſon was appendant, he need not, in ſtating the preſentation, alledge, that it was *tempore pacis*,

SERJEANT BARTON. The plaintiff has failed in his count. He ſays, that *Sir George* was ſeiſed and preſented; but he does not ſay, that he preſented *tempore pacis*.

STRODE. When the plaintiff makes his title by a preſentation he ought to ſay, that it was *tempore pacis*; but *Sir George's* title is by reaſon of his being ſeiſed of the manor of *Dowling*, to which the advowſon is appendant: ſo that the difference as to that, will be betwixt an advowſon *in groſs* and an advowſon *appendant*.

S. C. 2. Mod. 183. Poſt. 253. Fitz. N. B. 31. 33. Co. Lit. 249.

5. Co. 72. 6. Co. 30. Hob. 102. Vaugh. 53. 10. Mod. 320. 1. Ld. Ray. 200. 2. Stra. 1096. 1911.

THE

STRODE *against* THE BISHOP OF BATH AND WELLS, AND OTHERS. Swange, 1006.

THE COURT. When a man ſhews a precedent right, and then alledges a preſentation in purſuance of that right, as in this caſe the plaintiff does in *Sir George Horner*, there it needs not be alledged to have been *tempore pacis*; but where no title is alledged, ſo that the preſentation only makes the title, there it muſt be pleaded *tempore pacis*.

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Caſe 20.

* Davies *againſt* Cutts.

To an action by the adminiſtrator of a *feme covert*, a plea that adminiſtration ought to have been to her *huſband* is bad.

DAVIES, as adminiſtrator to *Elizabeth B.* a *feme covert*, brings an action of debt upon a bond againſt *Cutts*. The defendant pleads, that adminiſtration of the wife's goods ought *de jure* to be committed to the huſband, who was then alive. Upon this there was a demurrer:—and IT WAS RESOLVED for the plaintiff; for he is rightful adminiſtrator till his letters of adminiſtration are repealed.

4. Co. 51. 12. Mod. 306. 618. Fitzg. 205. 303. 1. Vern. 88. 176. 2. Vern. 329. 2. Stra. 891. 1111. 1118. 1. Peer. Wms. 378. Salk. 36. 38.

See the ſtatute 21. Hen. 8. c. 5. ſ. 7. By 29. Car. 2. c. 3. ſ. 25. it is enacted, "that neither the ſtatute of *diſtributions*, "of 22. & 23. Car. 2. c. 10. nor any-"thing therein contained, ſhall be con-"ſtrued to extend to the eſtates of *feme* "*coverts* that ſhall die inteſtate, but that "their *huſbands* may demand and have "adminiſtration of their rights, credits, "and other perſonal eſtates, and recover "and enjoy the ſame, as they might have "done before the making of the ſaid "act."

Caſe 21.

James *againſt* Johnſon.

A *toll-traverſe* may be claimed as appurtenant to a manor by a *que eſtate* in the manor. The appurtenancy is not deſtroyed by the manor coming into the hands of the crown.

S. C. 2. Mod. 243. S. C. cited 3. Lev. 425. 1. Vent. 139. 10. Co. 59. Bunb. 68. Co. Lit. 121. Com. Dig. title, "Pleader," E. 24.

TRESPASS for taking and driving away ſome beaſts of the plaintiff. The defendant juſtifies, For that he and all they whoſe eſtate he has in ſuch a manor (the manor of *Blythe*) have had a toll for all beaſts driven over the ſaid manor, *viz.* a half-penny a-beaſt if under twenty; and if above, then fourpence a-ſcore.

Iſſue being joined upon this *juſtification*, a ſpecial verdict was found, *viz.* That the manor aforeſaid was parcel of the poſſeſſions of the priory of *Blythe*: that the prior had by preſcription ſuch a toll as appurtenant to the ſaid manor: that by the Diſſolution it came to the crown, and ſo to *Sir Gervaſe Clifton*, and at laſt to one *Bingley*, in whoſe right, as ſervant to him, the defendant juſtifies: but then they conclude, that if the defendant may entitle himſelf to it by a *que eſtate*, they find for the defendant; if not, then for the plaintiff.

SERJEANT BALDWIN, *for the plaintiff*. It does not appear, whether the toll which the defendant claims, be *a toll-thorough*, or *a toll-traverſe*, or what ſort of toll it is. *A toll-thorough* is

Fort. 339. Ante, 48. 105. 1. Lev. 190. 2. Lev. 19. Ray. 52. 389. Keilw. 148. 152. Statham, 2. pl. 236. Moor, 574. Cro. Eliz. 710. 3. Lev. 424. Comyns, 44. 1. Ld. Ray. 368. 2. Ld. Ray. 1400. 2. Wilſ. 286. 3. Burr. 1402. Cowp. 47. 1. Term Rep. 660.

againſt

JAMES against JOHNSON.

againſt common right, becauſe it is to be taken in the king's highway: and no preſcription can be for it, unleſs he that claims it, ſhew that the ſubject has ſome advantage by it: and when a man claims *a toll-traverſe*, he muſt lay it to be for a way over his own freehold. A toll ſuppoſeth a grant from the * crown; and therefore when the manor of *Blythe* came to the crown, the toll was disjoined from the manor, and became *in groſs*: nor can a toll be appendant to a manor, nor claimed by a *que eſtate*.

* [232]

SERJEANT MAYNARD. The jury have found exactly whatever the defendant has diſcloſed in his plea, and have made a ſpecial concluſion upon a point of pleading. Toll may be appurtenant to a manor, as well as any other *profit à prendre*; nor does it become *in groſs* by the manor coming to THE CROWN. The difference is as to that, betwixt things that had a being in the crown before they were granted out to ſubjects, and things which had not (*a*). There is no ſuch legal difference between a *toll-thorough* and a *toll-traverſe* as has been offered; the words are uſed promiſcuouſly in our books. A *toll-thorough* may be by preſcription, without any reaſonable cauſe alledged of its commencement: for having been paid time out of mind, the true cauſe of its beginning, in the intendment of the law, cannot be known. And for the *que eſtate*, indeed a thing that lies in grant cannot be claimed by a *que eſtate* directly by itſelf, but it may be claimed as appurtenant to a manor, by a *que eſtate* in the manor, &c.

CUR. *accord.* (*b*), and gave judgment for the defendant.

ATKYNS, *Juſtice*. When toll is claimed generally, it ſhall be intended *toll-thorough*; and ſo is the caſe in *Cro. Eliz.* 710. *Smith v. Shepheard.*

(*a*) See the caſe of the Abbot of Strada Marcella, 9. Co. 24.
(*b*) See 1. Term Rep. 666.

Lord Townſend *againſt* Dr. Hughes.

Caſe 22.

AN ACTION UPON THE STATUTE *de ſcandalis magnatum*, for theſe words: "My *Lord Townſend* is an unworthy perſon, "and does things againſt law and reaſon." Upon iſſue "not guilty" there was a verdict for the plaintiff, and four thouſand pounds damages given. The defendant moved for a new trial, Becauſe of the exceſſiveneſs of the damages; and a precedent was cited of a new trial granted upon that ground and no other.—ATKYNS, *Juſtice*, was for granting a new trial.—NORTH, *Chief Juſtice*, WYNDHAM and SCROGGS *contra*, for that the jury are the ſole judges of the damages.

The Court will not grant *a new trial* in an action of *ſcan. mag.* on the ground of *exceſſive damages*.
S. C. 1. Freem. 217. 220. 222. S. C. 2. Mod. 150.
Ante, 2.
1. Lev. 277.
Cowp. 230.

2. Vent. 59. 2. Sid. 434. Comyns, 439. 1. Stra. 422. 2. Ld. Ray. 954.

MAYNARD,

An action will lie on the ſtatute of *ſcandalis magnatum* for ſaying of a peer of the realm, that "he is an "unworthy "perſon, and "does things "againſt law "and reaſon."

S. C. 1. Mod. 233. 4. Co. 13. 1. Roll. Rep. 78. Vid. Ent. 72. Cro. Car. 136. Ley. 82. Palm. 562. 12. Co. 134. 2. Lev. 148. 277. 1. Sid. 434. 2. Vent. 60. 3. Bulſt. 226. Cro. Eliz. 68. 1. Leon. 336. 1. And. 121. Cro. Jac. 196. 2. Init. 228. Dyer 285. Poph. 67.

* MAYNARD, *Serjeant*, at another day moved in arreſt of judgment *(a)*, That the words are not actionable.—And of that opinion was ATKYNS, *Juſtice*; but NORTH, *Chief Juſtice*, WYNDHAM, and SCROGGS, *Juſtices*, *contra*: and ſo the plaintiff had judgment.

ATKYNS, *Juſtice*. The occaſion of the making of the ſtatute of 2. *Rich.* 2. ſt. 1. c. 5. appears in *Sir Robert Cotton's* Abridgement of the Records of the Tower, *fol.* 173. *num.* 9, 10. where he ſays, That, upon the opening of that parliament, the *Biſhop of St. David's*, in a ſpeech to both Houſes, declared the cauſes of its being ſummoned; and that amongſt the reſt, one of them was to have ſome reſtraint laid upon the ſlanderers and ſowers of diſcord; which ſort of men were then taken notice of to be very frequent. *Ex malis moribus bonæ leges.* The preamble of the act mentions, "Of deviſers of falſe news, and of horrible and falſe lies of pre- "lates, dukes, earls, barons, and other nobles and great men of "the realm, &c. which by the ſaid prelates, lords, nobles, and of- "ficers aforeſaid, were never ſpoken, done, nor thought, in ſlander "of the ſaid prelates, lords, nobles, and officers, whereby debates "and diſcord might ariſe betwixt the ſaid lords, or betwixt the "lords and the commons; and whereof great peril and miſchief "might come to all the realm, &c. if due remedy be not provided; "and therefore it is ſtrongly defended upon grievous pain, for to "eſchew the ſaid damages and perils, that from henceforth none "be ſo hardy to deviſe ſpeak or tell any falſe news, lies, or other "ſuch falſe things of prelates, lords, and of others aforeſaid, where- "of diſcord or any ſlander might riſe within the ſame realm; and "he that doth the ſame, ſhall incur and have the pain another time "ordained thereof by the ſtatute of *Weſtminſter* the firſt *(b)*, "which wills, that he be taken and impriſoned till he have found "him of whom *the word* was moved."—So that it ſeems deſigned againſt telling ſtories by way of news concerning them. The ſtatute does not make or declare any new offence; nor does it inflict any new puniſhment. All that ſeems to be new is this: FIRST, The offence receives an aggravation, becauſe it is now an offence againſt a poſitive law, and conſequently deſerves a greater puniſhment; as it is held in our Books, that if the king prohibit by his proclamation a thing prohibited by law, that the offence receives an aggravation by being againſt the king's proclamation. SECONDLY, Though there be no expreſs action given to the party grieved, yet by operation of law the action accrues. For whenever a ſtatute prohibits any thing, he that finds himſelf grieved, may have an action upon the ſtatute. 10. *Co.* 75. 12. *Co.* 100.

(*a*) See his argument, S. C. 2. Mod. 152. S. C. Freem. 220. pl. 227. 1. Sid. 233. 434. 1. Keb. 813. 1. Lev. 148. 277. 2. Keb. 537. Freem. 49. Vent. 60. 2. Sid. 21. 12. Co. 4. Co. 16. 2. Show. 505. Moor, 142. Cro. Eliz. 1. 67. Cro. Jac. 196. 3. Leon. 376. Hetley, 55. 3. Bulſt. 226. 1. Leon. 336.

(*b*) By 3. Edw. 1. c. 34. which ordains, that the offender ſhall be taken and kept in priſon until he hath brought him into court who was the firſt author of the tale. And by 13. Rich. 2. c. 1. if he cannot find the author, he ſhall be puniſhed by advice of the council.

There

There this very caſe upon this ſtatute was agreed on by the Judges. So that that is the ſecond new thing, *viz.* a further remedy, an action upon the ſtatute. THIRDLY, Since the ſtatute, the party may have an action in the *tam quam*, which he could not have before. Now every *lye* or *falſity* is not within the ſtatute; it muſt be *horrible* as well as *falſe*. We find upon another occaſion ſuch a like diſtinction. It was held in *Sir William Chancey's Caſe* (*a*), That the high-commiſſion court could not puniſh *adultery*; becauſe they had juriſdiction to puniſh enormous offenders only. So that "*great* and *horrible*" are words of diſtinction.—AGAIN, it extends not to ſmall matters, becauſe of the ill conſequences mentioned; "debates and diſcord betwixt the *ſaid lords, &c. great "peril to the realm, and quick ſubverſion and deſtruction of the "ſame." Every word imports an aggravation. The ſtatute does not extend to words that do not agree with this deſcription, and that cannot by any reaſonable probability have ſuch dire effects. The caſes upon this ſtatute are but few, and late in reſpect of the antiquity of the act. It was made in the year 1379. For a long time after we hear no tidings of an action grounded upon it; and by reading it one would imagine, that the makers of it never intended that any ſhould be. But the action ariſes by operation of law; not from the words of the act, nor their intention that made it. The firſt caſe that we find of an action brought upon it, is in 13. *Hen.* 7. which is one hundred and twenty years after the law was made: ſo that we have no *contemporanea expoſitio*, which we often affect. That caſe in *Keilway* 26. the next in 4. *Hen.* 8. where the *Duke of Buckingham* recovered forty pounds againſt one *Lucas*, for ſaying that "the duke had no more conſcience "than a dog; and ſo he got money, he cared not how he "came by it." He cited other caſes, and ſaid he obſerved, That where the words were general, the Judges did not ordinarily admit them to be actionable: otherwiſe, when they charged a peer with any particular miſcarriage. MAYNARD, *Serjeant*, obſerved well, that the nobility and great men are equally concerned on the defendant's part: for actions upon this ſtatute lie againſt them, as well as againſt the meaneſt ſubject. Acts of parliament have been tender of racking the king's ſubjects for words; and the ſcripture diſcountenances men's being made tranſgreſſors for a word. I obſerve that there is not one caſe to be met with, in which, upon a motion in arreſt of judgment in ſuch an action as this, the defendant has prevailed. The Court hath ſometimes been divided; the matter compounded; or the action has abated by death, &c. but a poſitive rule that judgment ſhould be arreſted we find not: ſo that it is time to make a precedent, and fix ſome rules according to which men may demean themſelves in converſe with great perſons. *Miſera eſt ſervitus, ubi jus eſt vagum.* Since we have obtained no rules from our predeceſſors in actions upon this ſtatute, we had beſt go by the ſame rules that they did in other actions for words. In them, when

LORD TOWNSEND *againſt* DR. HUGHES.

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Moor, 244.

(*a*) 12. Co. 83.

they

LORD TOWNSEND *againſt* DR. HUGHES.

they grew frequent, ſome bounds and limits were ſet, by which they endeavoured to make theſe laws certain. The actions now encreaſe. The * ſtream ſeems to be running that way. I think it is our part to obviate the miſchief. So he was of opinion, That the judgment ought to be arreſted.

* [235]

But THE COURT gave judgment for the plaintiff.

Caſe 23.

Jones's Caſe.

The court of common pleas may grant a writ of *habeas corpus*, though in a criminal caſe.

3. C. 2. Mod. 298. Prac. Reg. 282. Off. Br. 110. 112. Andrews, 274. 3. Burr. 1440. Tidd's Practice, 170. See 3. Bac. Abr. 3. 4. 15.

JONES was committed to *New Priſon* by a warrant from a juſtice of the peace on the ſtatutes of the 16. *Car.* 2. c. 4. and the 22. *Car.* 2. c. 1. for refuſing to give ſecurity for his good behaviour; he having been inſtrumental in the eſcape of a preacher of a *conventicle* opened contrary to thoſe ſtatutes.—MAYNARD, *Serjeant*, moved the Court for a *habeas corpus ad ſubjiciendum*. But NORTH, *Chief Juſtice*, doubted whether the court of common pleas could grant this writ in a criminal caſe.

There are, he ſaid, three ſorts of *habeas corpus* in this court: FIRST, A *habeas corpus ad reſpondendum*; and that is, when a man hath a cauſe of ſuit againſt one that is in priſon, he may bring him up hither by *habeas corpus*, and charge him with a declaration at his own ſuit.—SECONDLY, There is a *habeas corpus ad faciendum et recipiendum*; and that defendants may have, that are ſued in courts below, to remove their cauſes before us. Both theſe *habeas corpus* are with relation to the ſuits properly belonging to the court of common-pleas. So if an inferior court will proceed againſt the law, in a thing of which we have conuſance, and commit a man, we may diſcharge him upon a *habeas corpus*; this is ſtill with relation to the common-pleas. A third ſort of *habeas corpus* is for privileged perſons. But a *habeas corpus ad ſubjiciendum* is not warranted by any precedents that I have ſeen (*a*).

(*a*) The writ was granted, and the priſoner brought into court; but he was remanded, becauſe the Court would not take ſureties for his good behaviour: but now by the *habeas corpus* act, 31. Car. 2. c. 2. any of the ſuperior courts in Term time, and any Judge of any of thoſe courts in vacation time, may award a *habeas corpus* to *any priſoner whatſoever*.

EASTER TERM,

The Twenty-Ninth of Charles the Second,

IN

The Common Pleas.

Sir Francis North, *Knt. Chief Juſtice.*

Sir Robert Atkins, *Knt.*
Sir Hugh Wyndham, *Knt.*
Sir William Scroggs, *Knt.* } *Juſtices.*

Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

* Hall *againſt* Booth.

Caſe 1.

NORTH, *Chief Juſtice.* In actions of debt, &c. the firſt proceſs is *a ſummons*: if the defendant appear not upon that, *a capias* goes; and then we hold him to bail. The reaſon of bail is upon a ſuppoſition of law, that the defendant flies the judgment of the law. And this ſuppoſition is grounded upon his not appearing at the firſt. For if he appear upon *the ſummons*, no bail is required *(a)*. And this is the reaſon why it is held againſt the law, for any inferior court to iſſue out *a capias* for the firſt proceſs: for the liberty of a man is highly valued in the law, and no man ought to be abridged of it without ſome default in him.

In civil actions the firſt proceſs is *ſummons*; and if the defendant appear, *common bail* ſhall be filed; but if he do not appear, *a capias* iſſues to hold him to *ſpecial bail.*

Prac. Reg. 72.

Yelv. 53. 6. Mod. 63. Dougl. 62. note (36).

(a) See Tidd's Practice 28. 122.

Caſe 2.

Rogers *againſt* Davenant.

The ſpiritual court may compel pariſhioners to make a rate for repairing *the nave* of the church but not of *the chancel*; but the rate,

BY THE COURT.—FIRST, If a church is in decay, the biſhop's court muſt proceed againſt the whole pariſh to have it repaired; for they cannot rate any particular perſon towards the repair of it. But the churchwardens muſt ſummon the pariſh; and that needs not be from houſe to houſe, but a general public ſummons at the church is ſufficient: and the major part of them that appear may bind the pariſh.

whether for repairing or rebuilding, muſt be made by the majority of the pariſhioners aſſembled by a general public ſummons from the churchwardens.—S. C. ante, 194. Poſt. 259. Fitz. N. B. 50. 2. Inſt. 489. 5. Co. 67. Poph. 197. 2. Roll. Abr. 291. 311. 1. Roll. Rep. 126. Lutw. 1023. 1. Ld. Ray. 59. 3. Term Rep. 3.

SECONDLY, If the church and chancel be out of repair, the pariſhioners are only chargeable to be contributory towards the repairs of the *navis eccleſiæ*.

3. Keb. 829.

THIRDLY, If a libel be againſt the pariſh for not repairing the church, though the word "*eccleſia*" may include *the chancel*, yet we will not grant a prohibition.

1. Jones, 89. 2. Mod. 222. 259. 2. Lev 186. 1. Vent. 367. 308. 8. Mod. 338. 10. Mod. 12. 22.

FOURTHLY, If a tax be ſet by the major part of the pariſh *pro reparatione eccleſiæ*, it is well enough; and afterward any part of the money raiſed be laid out upon the chancel, the pariſh ought not to allow it upon the churchwardens accounts. But if a tax be impoſed expreſsly for the repair of the body of the church and of the chancel, we will not ſuffer them to proceed. Or if a libel be againſt a pariſh for not repairing the *navis eccleſiæ* and *the chancel*, we will prohibit * them.

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12. Mod. 83. 1. Ld. Ray. 89. 2. Ld. Ray. 1388. 1390. 3. Stra. 570. 2. Stra. 1045. 1145. 2. Peer. Wms. 107. 125. Andrews, 69. Fort. 346. 109. 3. Burr. 1689.

FIFTHLY, If a church be down, and the pariſh increaſed, ſo that of neceſſity they muſt have a larger church, the major part of the pariſh may raiſe a tax for the enlarging it as well as the repairing it.

It was inſiſted on at the bar, That to a tax for the increaſing of a church, the conſent of every pariſhioner muſt be had.—But THE COURT was of another opinion.

See the ſtatute *De Circumſpecte Agatis*, 13. Edw. 1. ſtat. 4. c. 1.

Caſe 3.

Southcote *againſt* Stowell.

A having two ſons *C.* and *D.* covenants to ſtand ſeiſed to

BALDWIN, *for the plaintiff.*—*Thomas*, the covenantor, may be ſaid to take an eſtate for life by implication; and then it will be all one as if an expreſs eſtate for life had been limited to *the uſe* of *C.* and the heirs male of his body; and for default of ſuch iſſue, to the uſe of the heirs male of his own body, with remainder to his own right heirs. *C.* dies, leaving iſſue a ſon *E.* and a daughter: then *A.* dies: then *E.* dies without iſſue. The remainder to the heirs male of *A.* veſted in *E.* as a *purchaſor*; and after his death the eſtate *deſcended* to his uncle *D.* as heir male of the body of *A. per formam doni.*—S. C. ante, 226. S. C. 2. Mod. 207. S. C. Freem. 216. S. C. 3. Keb. 704. S. C. 2. Danv. 556. Ante, 120. 160. Co. Lit. 22. 26. 2. Co. 91. 1. Vent. 381. Dyer, 156. Cro. Eliz. 109. Cro. Car. 24. 2. Leon. 25. Co. Lit. 220. 8. Mod. 23. 9. Mod. 4. 162. 176. 10. Mod. 421. 436. 370. 520. 11. Mod. 119. 12. Mod. 38. Gilb. Eq. Rep. 16. Fitzg. 14. 1. Ld. Ray. 34. 1. Peer. Wms. 59. 229. 622. 2. Peer. Wms. 1. 3. Com. Dig. "Eſtates" (B 3.). Dougl. 501.

him,

him, with a remainder to his heirs males, which would be a fee-tail executed in himſelf; and if ſo, then *William* has a good title; and he cited *Lord Paget's Caſe* (*a*), the *Rector of Chedington's Caſe* (*b*), *Fenwyke v. Mittford* (*c*), *Hodgekinſon v. Wood* (*d*), and *Lane v. Pannell* (*e*). But if this will not hold, then *William* may take an eſtate by way of future ſpringing uſe: for this he quoted the caſe of *Mills v. Parſons* (*f*). If neither of theſe ways will ſerve, yet the remainder to the heirs males of *Thomas* may veſt in *Edward* (for *Sir Popham* died in the covenantor's life-time), and *William* may take by deſcent, as ſpecial heir *per formam doni*, though he be not heir of the body of *Edward*, in whom the remainder firſt veſts. SOUTHCOTE *againſt* STOWELL.

STROUD, *contra*. The limitation of a remainder in tail to the heirs males of the covenantor, is bad in its original creation; for no man can make himſelf, or his own heirs, *purchaſors*, without departing with the whole fee-ſimple. But all the caſes (*g*) are of eſtates paſſed by conveyance at common-law, and not by way of uſe. But uſes are directed * by the rules of the common-law, and as to the veſting of them, differ not from eſtates conveyed in poſſeſſion: *Chudleigh's Caſe* (*h*). No favourable conſtruction ought to be made for uſes againſt a rule of law. The ſtatute of 27. *Hen.* 8. c. 10. ſeems intended to extirpate all private uſes, and was in reſtitution of the common law. He cited the *Earl of Bedford's Caſe* (*i*), and *Fenwyke v. Mittford* (*k*). If *Thomas* took any eſtate by this ſettlement, he took a fee-ſimple; for no eſtate being limited to him, if he took any the law veſted it in him. Now the act of law will not ſettle in him an eſtate-tail, which is a fettered eſtate, but a fee ſimple, if any-thing. And the rather, becauſe the reaſon of it muſt be upon a ſuppoſition, that the *old uſe* continues ſtill in him, being never well limited out of him. Then he argued, that admitting the limitation to be good, yet ſince it veſted in *Edward* as a purchaſor, it is ſpent by his dying without iſſue. * [238]

But NORTH, *Chief Juſtice*, WYNDHAM, and ATKINS, *Juſtices*, were of opinion, That if an eſtate limited to a man, and the heirs of the body of his father, veſt in him, be it either by *deſcent* or *purchaſe*, and he die without iſſue, it ſhall go to his brother, &c.: ſo in this caſe, if the remainder to the heirs males of *Thomas* ever veſted in *Edward*, it comes to *William*, as heir male of the body of *Thomas*, and he is *a ſpecial heir* to take by deſcent.

(*a*) 1. And. 265.
(*b*) 1. Co. 154.
(*c*) Moor, 284. 1. And. 256. Cro. Eliz. 321.
(*d*) Cro. Car. 23.
(*e*) 1. Roll. Rep.
(*f*) 2. Roll. Abr. 794.
(*g*) 24. Edw. 3. pl. 28. 42. Edw. 3. pl. 5. Bro. Abr. 287. pl. 23. 24. Hen. 4. pl. 32. 1. Hen. 5. pl. 8. 2. Hen. 5. pl. 4. 1. Bro. Abr. 288. b. pl. 66. 1. Hen. 8. pl. 65. 42. Aſſ. 2. Dyer, 69. b. 309. b. Co. Lit. 22. 2. Inſt. 333. 2. Bro. Abr. 69. pl. 66.
(*h*) 1. Co. 138.
(*i*) 1. Co. 130. Poph. 3. Moor, 718.
(*k*) Co. Lit. 22. b.

SOUTHCOTE *againſt* STOWELL.

SECONDLY, They agreed, That at the common-law, a man could not make his right heir *a purchaſor*, without parting with the whole fee; but that by way of *uſe* he might: *Creſwold's Caſe*, in *Dyer*, is of an eſtate executed. They agreed the limitation of the remainder, in this caſe, to be good; and that it veſted in *Edward*, as a purchaſor.

But ſee Wills *v.* Palmer, 5. Burr. 2615. 2. Bl. Rep. 687. and Fearne C.R. 54.

NORTH, *Chief Juſtice*. It cannot take effect as a *ſpringing uſe*; becauſe where the limitation is of a remainder, the law will never conſtrue it ſo, as to ſupport it any other way. This, he ſaid, he had known reſolved in one *Cutler's Caſe*, in the king's bench.

SCROGGS, *Juſtice*, agreed to the judgment; but ſaid, he went contrary to the books in ſo doing, which go upon nice and ſubtile differences, little leſs than metaphyſical.

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Caſe 3*.

* Juſtice *againſt* Whyte.

In debt againſt *A.* as *executor* of *B.* if he plead that he is *adminiſtrator*, and not *executor*, he muſt expreſly ſhew, that *B.* died inteſtate, and the time when adminiſtration was granted, and conclude *in abatement* and not *in bar*.—Ante, 214. 11. Co. 52.

DEBT againſt the defendant as executor to *John Whyte*. The defendant pleaded, That *John Whyte* did make a will, but made not him executor, and that the ſaid *John* had *bona notabilia* in divers dioceſes, and that the Archbiſhop of *Canterbury* committed adminiſtration to the defendant, and concluded in bar; to which there was a demurrer.

SERJEANT TURNER. FIRST, This is a plea *in abatement* only, and the defendant has concluded *in bar*: *Cro. Eliz.* 202. *Iſham v. Hitchcot.*

1. Sid. 359. 8. Co. 134. 1. Lev. 235. Comyns, 150. 2. Stra. 1106. 8. Mod. 244. 288. 12. Mod. 100. 3. Peer. Wms. 349. 3. Peer. Wms. 370. 2. Eq. Abr. 78.

SECONDLY, The defendant does not traverſe, *abſque hoc* that he ever adminiſtered as executor: 20. *Hen.* 6. 1. b. *per* FORTESCUE.

THIRDLY, The defendant does not ſhew when adminiſtration was committed to him; for if it were committed hanging the writ, it will not abate it: 21. *Hen.* 6. *pl.* 8. 5. *Hen.* 5. *pl.* 10, 11. *Br. tit.* "*Executors*," 7. 4. *Hob.* 49.

FOURTHLY, The defendant does not lay it expreſly that *John Whyte* died inteſtate; but only ſays, that he made a will, but did not appoint him, the defendant, to be his executor by that will, and that adminiſtration was granted to him. Now although the defendant was not made executor by the will, yet he might have been made ſo by a codicil annexed to the will: 2. *Roll. Rep.* 285.

1. Peer. Wms. 766.

FIFTHLY, He ſays not in what province the *bona notabilia* were; and perhaps they were in the province of *York*.

THE COURT gave judgment for the plaintiff, *niſi cauſa*, &c. chiefly for the *firſt* and *fourth* reaſons.

Page *againſt* Tulſe, Sheriff of Middleſex.

Caſe 4.

MIDD. ſc. HENRICUS TULSE *nuper de Lond. miles, et* ROBERTUS JEFFRIES *nuper de Lond. miles, nuper vicecom. com. prædict. attachiati fuer. ad reſpondendum* THOMÆ PAGE *de placito tranſgreſſ. ſuper caſum, &c. Et unde idem* THO. *per* BALE *attornatum ſuum queritur, quare cum quidem* SAM. **WADHAM, alias* WADDAM, *Term. Sanct. Trin. ann. regni dom. regis nunc viceſimo ſexto, et antea indebitatus fuiſſet eidem* THO. PAGE *in* 34 *libris monetæ Angliæ, idemque* THO. *pro obtentione earund. eodem Term. Sanct. Trin. anno viceſimo ſexto ſupradict. debito modo proſecutus fuiſſet extra cur. domini regis nunc coram ipſo rege (eâdem curiâ apud Weſtmonaſt. in prædict. com. Midd. tunc exiſtente) quoddam præceptum ipſius domini regis verſus prædict.* SAMUELEM *vicecom. Midd. direct. per quod eid. tunc vicecomiti præcept. fuit, quòd caperet præfatum* SAMUELEM, *ſi, &c. et eum ſalvo, &c. ita quòd haberet corpus ejus cor. dict. dom. rege apud Weſtmonaſt. die Veneris prox. poſt. tres ſeptimanas Sancti Mich. prox. ſequent. ad reſpondendum eidem* THO. *de placito tranſgr. ac etiam billæ ipſius* THO. *verſus prædict.* SAM. *pro triginta quatuor libris ſuper aſſumptionem ſecund. conſuetud. cur. dict. dom. regis cor. ipſo rege exhibend. et quòd idem vicecomes haberet ibi tunc præceptum illud, &c. Quod quidem præceptum idem* THOMAS *poſtea et ante return. ejuſd. ſcil. quarto die Julii anno viceſimo ſexto ſupradict. apud Weſtmonaſt. in com. prædict. præfat.* HENRIC. *et* ROBERTO *tunc vicecom. prædict. com. Midd. deliberavit, eâ intentione quòd prædict.* SAMUEL. *virtute præcepti illius caperetur et arreſtaretur, et ad præd. diem return. ejuſdem in dict. cur. dict. dom. regis coram ipſo rege ſecundum conſuetudinem ejuſdem cur. cuſtodiæ Mariſchalli Mariſchalciæ dom. regis cor. ipſo rege committeretur, ad intentionem quòd idem* THO. *verſus præfat.* SAMUEL. *cuſtodiæ ejuſdem Mariſchalli Mariſchalciæ ſic commiſſum, et in cuſtod. ſuâ exiſtent. ſecund. conſuetudinem dict. cur. dict. dom. regis coram ipſo rege per bill. ipſius* THO. *verſus præd.* SAMUEL. *in eâdem cur. exhibend. in placito tranſgreſſionis ſuper caſum ſuper aſſumptionem ipſius* SAM. *pro præd.* 34 *libris eid.* THO. *ſolvend. et pro recuperatione earund. narraret et implacitaret: et quòd præd.* SAM. *antequam ipſe ab hujuſmodi cuſtod. prædict. Mariſchall. Mariſchalciæ deliberaretur aut ad largum ire dimitteretur, imponeret in eâdem cur. in præd. placito tranſgreſſionis ſuper caſum ſufficientes manucaptores eid.* THO. *inde reſponſur. ſecund. conſuetudinem cur. illius; virtute cujus quidem præcepti prædictus* HENRICUS *et* ROBERTUS *poſtea et ante return. ejuſdem, ſcil.* 14 *die Julii ann.* 26 *ſupradict. tunc vicecom. com. præd. ut præfertur, exiſtentes præfat.* SAMUEL. *apud Weſtmonaſter. prædict. in com. prædict. ceperunt et arreſtaverunt, et ipſum* SAMUEL. *in cuſtodiâ ſuâ ex cauſâ prædict. habuerunt et deti-*

* *nuerunt. Prædicti tamen* HENRICUS *et* ROBERTUS, *officii ſui vicecom' debitum in verâ et juſtâ executione præcepti iſtius, iis, ut præfertur, direct' et deliberat', minimè curantes, ſed machinantes ipſum* THOMAM *minus ritè prægravare, et in proſecutione ſectæ*

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A declaration in an action on the caſe againſt the ſheriff of Middleſex for a *falſe return*, ſtating, that THE PLAINTIFF ſued out a *capias* in the king's bench, directed to the defendant, by virtue of which he arreſted the party, and at the return of the writ returned *cepi corpus et paratum habeo*, but had not the body there at the return of the writ. The defendant pleads the 23. *Hen.* 6. c. 10. and that he took bail, and ſo let the party go at large. The plaintiff, proteſting that the defendant had not taken ſufficient ſurety for the appearance of the party, pleads that they had not the body at the return of the writ. The plaintiff demurs. Judgment for the defendant.

S. C. 1. Freem. 209. 225. S. C. 2. Mod. 83. 1. Roll. Abr. 92. 807.

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Cro. Eliz. 460. 624. Moor, 428. 2. Saund 60.

1. Sid. 23, 439. 1. Lev. 86. 6. Mod. 122. 1. Salk. 99

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ſuæ prædictæ penitus fruſtrare, et de aſſecutione et obtentione prædict. 34 *librarum omnino impedire, prædict.* SAMUELEM *in cuſtodiâ ſuâ in formâ prædict. detent. exiſtent. (eodem* THOMA *de prædict.* 34 *libris ſeu aliquo denario inde minimè ſatisfacto) ſine licentiâ et contra voluntatem ipſius* THOMÆ *viceſimo ſecundo die Septembris ann.* 26 *ſupradicto, apud Weſtm. præd. extra cuſtodiam ipſorum* HENRICI *et* ROBERTI *tunc vicecom. com. prædict. exiſtent. ad largum quo voluit liberè et voluntariè ire et evadere permiſerunt, et nihilominus ad præd. diem returni præcepti præd. ipſi prædict.* HENRICUS *et* ROBERTUS *vicecom. præd. com. Midd. ut præfertur, exiſtentes, in prædict. cur. dicti dom. regis, coram ipſo rege apud Weſtmonaſter. prædict. in ipſius* THO. *grave damnum et præjudicium falſo et fraudulenter returnaverunt præceptum prædict. in formâ ſequente,* VIZ. " *quòd ipſi virtute cujuſdam brevis ſibi direct. ce-*" *piſſent corpus prædict.* SAMUELIS, *cujus quidem corpus ad diem* " *et locum in eodem præcept. content. cor. dict. domino rege parat. ha-*" *buerunt prout per idem præcept. ſibi præcipiebatur,*" *ubi revera prædict.* HENRICUS *et* ROBERTUS CORPUS PRÆDICTI SAMUELIS *ad locum in præcept. prædict. content. non parat. habuerunt, juxta exigentiam præcept. prædict. et return. ſuum prædict. ſed prædictus* SAMUEL *poſt evaſionem ſuam prædict. ſeipſum ad loca eidem* THOMÆ *penitus incognita elongavit et retraxit, quorum prætext. idem* THO. *non ſolùm in proſecutione ſectæ ſuæ prædictæ manifeſtò retardatus exiſtit, verumetiam de obtentione prædictar.* 34 *librarum ei, ut præfertur, debit. omnino impeditus et defraudatus exiſtit, ad dampnum ipſius* THO. 43 *librarum et inde producit ſectam. Et prædicti* HENRICUS *et* ROBERTUS *per* JOH. TISLER *attornatum ſuum veniunt et defendunt vim et injuriam quando, &c. et dicunt quòd prædictus* THO. *actionem ſuam prædictam inde verſus eos habere ſeu manutenere non debet, quia dicunt quòd cùm per quendam actum in parliamento domini* HENRICI *nuper regis Angliæ, &c. ſexti poſt Conqueſtum, apud Weſtmonaſter. in com. Midd.* 24 *die Februarii anno regni ſui* 23. *tent. editum, inter alia inactitatum exiſtit*

* [242] *authoritate ejuſdem parliamenti quòd vicecomes, ſub-vicecomes, * clericus vicecom. ſeneſchallus ſive ballivus franchefiæ vel ballivus ſive coronator non caperet aliquid colore officii per ipſum nec per aliquam perſonam ad ejus uſum de aliquâ perſonâ pro confectione alicujus return. ſive panell. et pro copiâ ejuſd. panell. præterquam* 4 *denarios; et quòd prædict. vicecomes et omnes alii officiar. et miniſtri prædicti emitterent extra priſonam,* ANGL. ſhould let out of priſon, *omnimodas perſonas per ipſos vel eorum aliquos arreſtat. ſeu exiſtent. in eorum cuſtodiâ vigore alicujus brevis billæ ſive warrant. in aliquâ actione perſonali vel cauſâ indictamenti pro tranſgreſſione, ſuper rationabili ſecuritate ſufficientium perſonarum habentium ſufficiens infra com. ubi tales perſonæ ſint ad ballium ſive manucaptionem tradit. ad cuſtodiend. dies ſuos in talibus locis, prout prædict. brevia, billæ ſive warranta requirerent, tali perſonâ ſive perſonis quæ fuit vel forent in eorum cuſtodiâ per condemnation. execution. cap. utlagatum ſive excommunicat. et pro ſecuritate pacis, et omnibus talibus perſonis quæ forent commiſſ. ad cuſtod. per ſpeciale mandatum aliquorum juſticiariorum, et vagrantibus recuſantibus ad ſerviendum ſecundum formam ſtatuti*

ſtatuti de Laboratoribus tantummodo exceptis, prout per actum prædictum plenius apparet. Et iidem HENRICUS *et* ROBERTUS *ulterius dicunt quòd ipſi decimo quarto die Julii anno regni dicti dom. regis nunc, &c. viceſimo ſexto ſupradict. in dictâ narratione ſuperius ſpecificat. iiſdem* HENR. *et* ROBERTO *tunc vicecom. com. præd. exiſtentibus, apud parochiam S. Clementis Danorum in com. prædict. ceperunt et arreſtaverunt prædictum* SAMUELEM WADHAM *virtute præcepti prædicti in narratione prædict. ſuperius ſpecificat. ac ipſum ad priſonam dicti dom. regis ſub cuſtodiâ vicecom. com. præd. tunc exiſten. tunc et ibidem commiſerunt, prædictoque* SAMUELE *ſub cuſtodiâ prædict.* HENR. *et* ROBERTI *exiſtent. pro eâdem cauſâ, et pro nullâ aliâ cauſâ, prædict.* SAM. WADHAM *poſtea et ante return. præcepti illius, ſcil. prædicto decimo quarto die Julii anno viceſimo ſexto ſupradicto apud paroch. prædict. in com. prædict. invenit et obtulit prædict.* HENRICO *et* ROBERTO *adtunc vicecom. com. prædict. exiſtentibus rationabilem ſecuritatem ſufficientium perſonarum habentium ſufficiens infra com. prædict. Middleſex ad ſervandum diem ſuum prædict. in præcepto prædict. ſuperius ſpecificat. ad reſpond. præfato* THO. *de placito tranſgreſſionis ac etiam billæ ipſius* THO. *verſus præfatum* SAMUELEM *pro triginta quatuor libris ſuper aſſumptionem ſecundum conſuetudinem cur. ipſius dom. regis coram ipſo rege exhibend. ſecundum exigentiam præcepti illius,* VIZ. WILLIELMUM KING *de* * *paroch. Sancti Martini in Campis in com. Middleſex generoſ. et* THO. WILLIAMS *de eâdem paroch. in com. prædict.* taylor; *qui quidem* WILLIELMUS KING *et* THO. WILLIAMS *eundem* SAMUELEM *adtunc manucapere obtulerunt quòd ipſe idem* SAM. WADHAM *compareret coram dicto dom. rege apud Weſtmon. die Veneris prox. poſt tres ſeptimanas Sancti Mich. prox. ſequent. ad reſpondend. præfat.* THO. PAGE *de placito tranſgreſſionis et billæ prædict. in narratione prædict. ſuperius ſpecificat. ſecundum formam et effectum actûs prædicti. Et iidem* HENR. *et* ROBERTUS *ulterius dicunt, quòd poſtea et ante returnum præcepti prædicti, ſcil. prædicto decimo quarto die Julii ann. viceſimo ſexto ſupradicto iiſd.* HENR. *et* ROBERTO *tunc vicecom. com. præd. exiſten. apud paroch. Sancti Clementis Danor. præd. vigore ſtatut. præd. cap. de præfat.* SAMUELE *rationabilem ſecuritatem prædict. viz.* WILLIELMUM KING *et* THO. WILLIAMS; *qui quidem* WILLIELMUS KING *et* THO. WILLIAMS *iiſdem die et anno apud paroch. prædict. Sancti Clementis Danor. in com. prædict. per quoddam ſcriptum ſuum obligatorium ſub ſigill. prædictor.* WILLIELMI KING *et* THO. WILLIAMS, *cujus dat. eſt decimo quarto die Jul. ann. viceſimo ſexto ſupradict. conceſſiſſent et quilibet eorum conceſſit ſe teneri præfato* HENRIC. *et* ROBERT. *ut vicecom com præd. in ſummâ* 70 *librar. bonæ et legalis monetæ Angliæ cum conditione eidem ſcript. obligator. ſubſcript. quòd prædict.* SAMUEL. *compareret coram dicto dom. rege apud Weſtmonaſt. prædict. die Veneris prox. poſt tres ſeptimanas Sancti Michaelis prox. ſequent ad reſpondend præfato* THO. PAGE *de placit. tranſgreſſionis et billæ prædict. ſecundum exigentiam præcepti prædicti, et ſuperinde adtunc et ibid. emiſerunt præfat* SAM. *extra priſonam prædict. ſecundum formam ſtatuti prædict. ut eis bene licuit, quæ eſt eadem ad largum ire permiſſio prædict. unde præd.* THO. PAGE

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ſuperius verſus eos queritur. Et ulterius iidem HENR. *et* ROBERT. *dicunt quòd ipſi poſtea, ſcil. ad diem returni ejuſdem præcepti coram dicto dom. rege apud Weſtmonaſt. prædict. iiſdem* HENR. *et* ROBERT. *tum vicecom. com. præd. exiſtent. returnaverunt præceptum prædictum quòd ipſi virtute præcepti prædicti cepiſſent præfatum* SAMUELEM *cujus corpus coram dicto dom. rege ad diem et locum in eodem præcept. content. parat. habuerunt, prout per idem præcept. præcipiebatur, et hoc parati ſunt verificare, unde petunt judicium et damna ſua occaſione prædict. ſibi adjudicand. Et prædict.* THO. PAGE, *dicit quòd ipſe per aliqua per prædict.* HENRIC. *et* ROBERT. *ſuperius placitando allegat. ab actione ſuâ prædict. verſus præd.* HENR.
* [244] *et* ROBERT. *habend. præcludi non debet,* * *quia proteſtando quòd prædict* HENR. *et* ROBERT. *non ceperunt ſecuritatem ſufficientium perſonarum pro comparentiâ prædict.* SAMUELIS *ad diem et locum in præcepto præd. ſuperius ſpecificat. prout præd.* HENR. *et* ROBERT. *ſuperius placitando allegaverunt, pro placito idem* THOM. *dicit quòd iidem* HENR. *et* ROBERT *corpus præfati* SAMUELIS *ad diem et locum in præcept. præd. content. cor. dicto dom. rege non parat. habuerunt juxta exigentiam præcepti prædict. et returnum ſuum prædict. et hoc paratus eſt verificare, unde petit judicium et damna ſua occaſione præmiſſorum ſibi adjudicari.*

The defendants demur to this replication, and the plaintiff joins in demurrer.

An action will not lie againſt a ſheriff for taking inſufficient bail.

32. *Hen.* 6. pl. 28. Vide ante, 57. 227 pl. 17. 2. Inſt. 376. F. N. B. 55. Gilb. C. B. 32. Tidd's Pract. 111. 1. H. Bl. Rep. C. B. 468.

SERJEANT STRODE, *for the defendant.* Before the ſtatute of *Weſtminſter* 2. cap. 10. no man could make an attorney without the king's writ *de attornato faciendo*; and there was no other return at the common law than "*cepi corpus*," or "*non eſt inventus.*" The ſtatute of 23. *Hen.* 6. c. 9. doth not alter the return; the deſign of that ſtatute is only to provide for the defendant's caſe, and againſt the extortion of ſheriffs and their officers: ſo that the ſheriff being obliged to return a *cepi* and yet to let the defendant to bail, there can be no reaſon why he ſhould be charged for not having the body at the day; and he cited *Langton v. Gardner (a)*, *Barton v. Aldworth (b)*, the caſe of *Bowles v. Laſſel (c)*. The ſheriff took bail according to this ſtatute, and returned a *languidus in priſonâ* though the defendant was at large: reſolved that no action lay againſt the ſheriff. In *Roll's Abridgment* (*d*) no action lies againſt the ſheriff for not having the body at the day, becauſe he is compellable by the ſtatute to let him to bail; and ſo he ſaid it was reſolved in a caſe between *Francklyn v. Andrews (e)*, but adjudged for the plaintiff upon the inſufficiency of the pleading.

SERJEANT CONYERS, *for the plaintiff.* I agree that an action of *eſcape* will not lie againſt the ſheriff, becauſe he is compellable to ſet him to bail; but this is an action at the common law for a *falſe return*, which if it ſhould not be maintainable, the deſign of

(*a*) Cro. Eliz. 460. Moor, 428.
(*b*) Cro. Eliz 624.
(*c*) Cro. Eliz. 852. Noy, 39.
(*d*) 1 Roll. Abr. 92.
(*e*) In B. R. 24. Car. 1.

the

the ſtatute would be defrauded: for the plaintiff cannot control the ſheriff in his taking bail, but he may take what perſons and what bail he pleaſeth: and if he ſhould not be chargeable in an action for not having the body ready, the plaintiff could never have the effect of his ſuit: * and although the ſheriff be chargeable, he will be at no prejudice; for he may repair his loſs by the bail-bond: and it is his own fault if he take not ſecurity ſufficient to anſwer the debt. The laſt clauſe in the ſtatute is, "That if "any ſheriff return a *cepi corpus* or *reddidit ſe*, he ſhall be charge-"able to have the body at the day of the return, as he was be-"fore, &c." That "if" implies a liberty in the ſheriff not to return a *cepi corpus* or *reddidit ſe*.

PAGE *againſt* TULSE.

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Vide ante, 54. 55.

But notwithſtanding, by the opinion of NORTH, *Chief Juſtice*, WYNDHAM, and ATKINS, *Juſtices*, the plaintiff was barred. The caſe of *Bowles v. Laſſel*, they ſaid, was a ſtrong caſe to govern the point; and the return of *paratum habeo*, is in effect no more than that he had the body ready to bring into court, when the Court ſhould command him; and it is the common practice only to *amerce* the ſheriff till he does bring the body (*a*): and therefore no action lies againſt him; for it is not reaſonable that he ſhould be twice puniſhed for one offence, and that againſt the court only. SCROGGS delivered no opinion: but judgment was given, *ut ſupra*, for the defendant.

2. Saund. 59. 2. Mod. 177. 4. Burr. 1982.

(*a*) Impey's Pract. 155. Tidd's Pract. 159.

Cockram, Executor, *againſt* Welby.

Caſe 5.

ACTION UPON THE CASE againſt a ſheriff, For that he levied ſuch a ſum of money upon a *fieri facias* at the ſuit of the plaintiff, and did not bring the money into court at the day of the return of the writ, *per quod deterioratus eſt et damnum habet*, &c. The defendant pleads the ſtatute of 21. *Jac.* 1. c. 16. of Limitations. To which the plaintiff demurs.

The ſtatute of Limitations cannot be pleaded to an action of debt brought againſt a ſheriff for money levied under a *fieri facias*.

S. C. Freem. 236. S. C. 2. Mod. 212. S. C. 2. Show. 79. 5. Mod. 308. 8. Mod. 171. 2. Ld. Ray. 935. 1204. 1. Peer. Wms. 742. 2. Peer. Wms. 144.

BARRELL, *Serjeant*. This action is within the ſtatute. It ariſeth *ex quaſi contractu*: *Speake v. Richards*, *Hob.* 206. It is not grounded on a record; for then *nullum tale recordum* would be a good plea; which it is not: It lies againſt the executors of a ſheriff, which it would not do if it aroſe *ex maleficio*.

PEMBERTON. This action is not brought upon the contract. If we had brought an *indebitatus aſſumpſit*, which perhaps would lie, then indeed we had grounded ourſelves upon the contract, and there had been more colour to bring us within the ſtatute; but we have brought an action upon the caſe, for not having our money here at the day, *per quod*, &c.

* NORTH, *Chief Juſtice*. An *indebitatus aſſumpſit* would lie, in this caſe, againſt the ſheriff or his executor; and then the ſtatute would be pleadable. I have known it reſolved, that the ſtatute

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COKEHAM *againſt* WELBY.

tute of Limitations is not a good plea againſt an attorney that brings an action for his fees, becauſe they depend upon a record here, and are certain.

This enſuing *Trinity Term*, the matter being moved again, THE COURT gave judgment for the plaintiff, *niſi cauſa, &c.* If the *fieri facias* had been returned, then the action would have been grounded upon the record, and it is the ſheriff's fault that the writ is not returned: but, however, the judgment in this court is the foundation of the action. Debt upon the ſtatute of 2. *Edw.* 6. c. 13. for not ſetting out tithes, is not within the ſtatute, for *oritur ex maleficio:* ſo the ground of this action is *maleficium*, and the judgment here given; in both which reſpects it is not within the ſtatute of Limitations.

1. Cro. 540. 513. 533. 2. Saund. 38. Styles 214.

Caſe 6.

Barrow *againſt* Parrot.

If an infant *feme covert*, with intent to levy a fine to the uſes of herſelf and huſband, declare herſelf of age, when examined by commiſſioners under a *dedimus poteſtatem*, when in fact ſhe was greatly under age, yet *the fine* cannot be ſet aſide, although there is ſtrong ground that the examination was collufive.

PARROT had married one *Judith Barrow*, an heireſs. *Sir Herbert Parrot*, his father, and an ignorant carpenter, by virtue of a *dedimus poteſtatem* to them directed, took the conuſance of a fine of the ſaid *Judith*, being under age, and by indenture the uſe was limited to *Mr. Parrot* and his wife for their two lives, the remainder to the heirs of the ſurvivor. About two years after the wife died without iſſue; and *Barrow*, as heir to her, prayed the relief of the Court.

Upon examination it appeared, that *Sir Herbert* did examine the woman whether ſhe were willing to levy the fine; and aſked the huſband and her, Whether ſhe were of age or not? Both anſwered that ſhe was. She afterwards, being privately examined touching her conſent, anſwered as before, and that ſhe had no conſtraint upon her by her huſband; but ſhe was not there queſtioned concerning her age. *Sir Herbert Parrot* was not examined in court upon oath, becauſe he was accuſed.

S. C. 2. Vent. 30. Ante, 48. Poſt. 252. 3. Lev. 36.

NORTH, *Chief Juſtice*, ſaid, this court could no more adminiſter an oath *ex officio* than the ſpiritual court could —NORTH and WYNDHAM. There is a great truſt repoſed in the commiſſioners, * and they are to inform themſelves of the party's age; and a voluntary ignorance will not excuſe them.

* [247]

10. Mod. 42. 179. 245. 436. 11. Mod. 181. 196. 210. 12. Mod. 444. Abr. Eq. 283. 258. Fitzg. 114.

But ATKYNS, *Juſtice*, oppoſed his being fined. He cited *Hungat's Caſe* (*a*), where a fine by *dedimus* was taken of an infant; and becauſe it was not apparent to the commiſſioners that the infant was within age, they were in that court acquitted.

But NORTH, *Chief Juſtice*, WYNDHAM, and SCROGGS, *Juſtices*, agreed, that the ſon ſhould be fined, for that he could not poſſibly be preſumed to be ignorant of his wife's age.—ATKYNS, *contra*.

Caſ. Tem. Talb. 41. 167. 2. Salk. 567. 3. Peer. Wms. 206. 208. 235. 1. Ld. Ray. 113. Cowp. 622. 2. Term Rep. 159.

But THEY ALL AGREED, that there was no way to ſet the fine aſide.

(*a*) 12. Co. 122, 123.

TRINITY

TRINITY TERM,

The Twenty-Ninth of Charles the Second,

IN

The Common Pleas.

Friday, 15. *June* 1677.

Sir Francis North, *Knt. Chief Juſtice.*

Sir Robert Atkins, *Knt.*
Sir Hugh Wyndham, *Knt.* } *Juſtices.*
Sir William Scroggs, *Knt.*

Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

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* Searle *againſt* Long.

Caſe 7.

QUARE IMPEDIT againſt two. One of the defendants appears; the other caſts *an eſſoin:* wherefore he that appeared had *idem dies:* then he that was eſſoined appears, and the other caſts *an eſſoin.* Afterward *an attachment* iſſued for their not appearing at the day; and ſo proceſs continued to the *great diſtreſs:* which being returned, and no appearance, *judgment final* was ordered to be entered according to the ſtatute of *Marlb.* the 52. *Hen.* 3. c. 12. which enacts, that "in a plea "of *quare impedit*, if the diſturber come not at the firſt day that he "is ſummoned, nor caſt no eſſoin, then he ſhall be attached at "another day; at which day if he come not, nor caſt no eſſoin, "then he ſhall be attached at another day; at which day if he come "not, nor caſt no eſſoin, then he ſhall be diſtrained by the great "diſtreſs; and if he come not then, by his default, a writ ſhall go "to the biſhop of the ſame place, that the claim of the diſturber

The proceſs in *quare impedit* is *ſummons, attachment*, and *diſtreſs*; and if the defendant do not appear, or caſt an eſſoin, there ſhall be judgment for the plaintiff; but unleſs the defendant be perſonally ſerved with the ſummons, and good ſummoners returned by the ſheriff, the judgment

by default ſhall be ſet aſide.—S. C. 2. Mod. 264. Ante, 197. 1. Vent. 60. 1. Lev. 105. F. N. B. 32. 2. Saund. 35. 45. 2. Inſt. 80. 124. 3. Inſt. 125. Dyer, 153. 1. Jones, 412. 1. Bulſt. 160. Cro. Car. 341. 511. 517. 2. Show. 274. 6. Mod. 4, 5. 1. Salk. 216. 10. Mod. 310. 1. Brownl. 158.

"for

SEARLE *againſt* LONG.

" for that time ſhall not be prejudicial to the plaintiff, ſaving to " the diſturber his right at another time, when he will ſue there- " fore; and the ſame law as to the making of attachments ſhall " from henceforth be obſerved in all writs where attachments lie, " as in making diſtreſſes; ſo that the ſecond attachment ſhall be " made by better pledges; and afterwards the laſt diſtreſs."

PEMBERTON, *Serjeant*, moved to have this rule diſcharged, Becauſe the party was not ſummoned, neither upon the attachment nor the *great diſtreſs*, and the ſureties returned upon the proceſs were *John Doe* and *Richard Roe*: an affidavit was produced of *non-ſummons*, and that the defendant had not put in any ſureties, nor knew any ſuch perſons as *John Doe* and *Richard Roe*.

It was objected on the other ſide, That they had notice of the ſuit; for they appeared to the ſummons; and it appeared that they were guilty of a voluntary delay, in that they fourched in eſſoin; and the ſtatute of *Marlbridge* is peremptory: wherefore they prayed judgment.

MAYNARD, *Serjeant, for the defendants.* If judgment be entered againſt us, we have no remedy but by a writ of deceit. Now in a writ of deceit the *ſumners* and *veyors* are to be examined in court; and this is the trial in that action: but feigned perſons cannot be examined. It is a great abuſe in the officers to return ſuch feigned names. The firſt cauſe thereof was the ignorance of ſheriffs, who being to make a return, looked into ſome book of precedents for a form; and finding the names of *John Doe* and *Richard Roe* put down for examples, made their return accordingly, and took no care for true ſumners and true manucaptors. For non-appearance at the return of the great diſtreſs in a plea of
[249] *quare impedit*, * final judgment is to be given, and our right bound for ever; which ought not to be ſuffered, unleſs after proceſs legally ſerved, according to the intention of the ſtatute. In a caſe in *Michaelmas Term* the twenty-third of the preſent king, *Vivian v. the Biſhop of London*, judgment was entered in this court in a plea of *quare impedit*, upon non-appearance to the *great diſtreſs*; but there the party was ſummoned, and true ſummoners returned; upon non-appearance an attachment iſſued, and real ſumners returned upon that: but upon the diſtreſs it was returned, that the defendants *diſtricti fuerunt per bona et catalla, et manucapti per John Doe et Richard Roe*; and for that cauſe the judgment was vacated.

THE COURT. The deſign of the ſtatute of *Marlbridge* was to have proceſs duly executed, which if it were executed as the law requires, the tenant could not poſſibly but have notice of it. For if he do not appear upon the ſummons an attachment goes out; that is a command to the ſheriff to ſeize his body, and make him give ſureties for his appearance: if yet he will not appear, then the *great diſtreſs* is awarded; that is, the ſheriff is commanded to ſeize the thing in queſtion: if he come not in for all this, then *judgment final*

final is to be given. Now the iſſue of this proceſs being ſo fatal that the right of the party is concluded by it, we ought not to ſuffer this proceſs to be changed into a thing of courſe. It is true, the defendant here had notice of the ſuit; but he had not ſuch notice as the law allows him. And for his fourching in eſſoin, the law allows it him. Accordingly the judgment was ſet aſide.

SEARLE *againſt* LONG.

Anonymous. Caſe 8.

FALSE JUDGMENT out of a county court. The record was vicious throughout, and the judgment reverſed; and ordered, that the ſuitors ſhould be amerced *a mark*: but the record was ſo imperfectly drawn up, that it did not appear before whom the court was held; and the county-clerk was fined five pounds for it.

The court of king's bench may fine a county-clerk for negligence.

8. Co. 40.

2. Inſt. 55. 12. Mod. 16. Caſes in Crown Law, 2d edit. 183, 184. Dougl. 194.

Anonymous. Caſe 9.

CESSAVIT PER BIENNIUM (*a*). The defendant pleads "*non tenure.*" He commenceth his plea, "*quòd petenti* "*reddere non debet:*" but concludes *in abatement.*

Non tenure when pleaded to *the tenure* is in BAR, but when pleaded to the *tenancy* it is in ABATEMENT.

* BARRELL, *Serjeant.* He cannot plead this plea, for he has imparled.

THE COURT. Non-tenure is a plea in bar: the concluſion, indeed, is not good, but he ſhall amend it.

* [250]

Ante, 181. 1. Ld. Ray. 229. 476. 4. Bac. Abr. 105.

BARRELL, *Serjeant.* Non-tenure is a plea in abatement. The difference is betwixt non-tenure that goes to the tenure (as when the tenant denies that he holds of the demandant, but ſays that he holds of ſome other perſon, which is a plea in bar), and non-tenure that goes to the tenancy of the land; as here he pleads, that he is not tenant of the land; and that goes in abatement only.

The defendant was ordered to amend his plea.

(*a*) This writ was given by the Second, 13. Edw. 1. c. 21. See ſtatute of Glouceſter, 6. Edw. 1. c. 4. 2. Inſt. 295. F. N. B. 208. and the ſtatute of Weſtminſter the

Addiſon *againſt* Sir John Otway. Caſe 9*.

TENANT IN TAIL of land in the pariſhes of *Rippon* and *Kirby-Marleſtone*, in the towns of *A. B.* and *C.* The tenant in tail makes a deed of bargain and ſale to *J. S.* to the intent to make *J. S.* tenant to the *præcipe*, in order to the ſuffering of a common recovery of ſo many acres in the pariſhes of *Rippon* and recovery deſcribing them as lying *in Dale* generally, although the covenant deſcribe them as lying in *the pariſh* of Dale.—S. C. Freem 227. 235. 240. S. C. 2. Mod. 233. S. C. 3. Keb. 771. S. C. 2. Vent. 31. Ante, 49. 78. 208. 246. Allen, 88. 2. Co. 58. 8. Co. 155. 11. Co. 25. Co. Lit. 225. Hob. 224. Cro. Jac. 263. Comyns, 386. 2. Mod. 47. 236. 8. Mod. 276. 4. Burr. 2510. Cowp. 346.

Lands lying in *the pariſh* of *Dale*, but out of *the vill* of *Dale*, ſhall paſs by a fine and recove-

and

ADDISON *againſt* SIR JOHN OTWAY.

and *Kirby-Marleſtone*. Now in thoſe pariſhes there are two towns called *Rippon* and *Kirby-Marleſtone*; and the recovery is ſuffered of lands in *Rippon* and *Kirby-Marleſtone* generally: all this was found by ſpecial verdict. And further, that the intention of the parties was, that the lands in queſtion ſhould paſs by the ſaid recovery; and that the lands in queſtion are in the *pariſhes* of *Rippon* and *Kirby-Marleſtone*, but not within the *townſhips*; and that the bargainor had no lands at all within the ſaid *townſhips*.

The queſtion was, Whether the lands in queſtion ſhould paſs by this recovery, or not?

SHAFTOE. They will paſs. The law makes many ſtrained conſtructions to ſupport common recoveries, and abates of the exactneſs that is required in adverſary ſuits; as in *Dormer's Caſe* (*a*), in *Eare v. Snow* (*b*), in *Sir Moyle Finch's Caſe* (*c*), and in *Ferrers v. Curſon* (*d*). In the caſe of *Stork v. Foxe* (*e*), where two vills, *Walton* and *Street*, were in the pariſh of *Street*, and a man having lands in both, levied a fine of his lands in *Street*, his lands in *Walton* would not paſs: but there the conuſor had lands in the town of *Street* to ſatisfy the grant. But in * our caſe it is otherwiſe. He cited, alſo, *Roll. Abr.* "*Grants*" 54. and the caſe of *Baker v. Johnſon*, *Hutton*, 105. The deed of bargain and ſale and the recovery make up in our caſe but one aſſurance, and conſtruction is to be made of both together; as in *Cromwell's Caſe* (*f*). The intention of the party is to rule in fines and recoveries, and the intention of the parties in our caſe appears in the deed, and is found by the verdict: 2. *Roll. Abr.* 19. *Winch.* 122. *per Hobart*; *Cro. Car.* 308, *Sir George Symond's Caſe*: betwixt which laſt caſe and ours all the difference is, that that caſe is of a fine and ours of a common recovery; betwixt which conveyances, as to our purpoſe there is no difference at all. He cited *Jones v. Wait* in *Trinity Term*, 27. *Car.* 2. in this court, and a caſe of *Thynne v. Thynne*, 16. *Car.* 2. in the *King's Bench* when HYDE was Chief Juſtice.

* [251]

See the caſe of Maſſey *v.* Rice, Cowp. 349.

NORTH, *Chief Juſtice*. The law has always ſtuck at new niceties that have been ſtarted in caſes of *fines* and *common recoveries*, and has gotten over almoſt all of them. I have not yet ſeen a caſe that warrants the caſe at bar in all points; nor do I remember an authority expreſly againſt it, and it ſeems to be within the reaſon of many former reſolutions. But we muſt be cautious how we make a further ſtep.

WYNDHAM, *Juſtice*. I think the lands in queſtion will paſs well enough; and that the deed of bargain and ſale which leads the uſes of the recovery, does ſufficiently explain the meaning of

(*a*) 2. Roll. 67. 5. Co. 40.
(*b*) Plowd. 514. 18. Viner Abr. 214.
(*c*) 6. Co. 63. Co. Ent. 591. 2. Leon. 134.
(*d*) Cro. Jac. 643.
(*e*) Cro. Jac. 120, 121. 2. Roll. Abr. 54.
(*f*) 2. Co. 69. Jenk. 252. 2. Andr. 69. Moor, 471. Savil, 115. Co. Litt. 103.

the

the words *Rippon and Kirby-Marleſtone*, in the recovery. I do not ſo much regard the jury's having found what the party's intention was, as I do the deed itſelf, in which he expreſſes his own intention himſelf: and upon that I ground my opinion.

ADDISON *againſt* SIR JOHN OTWAY.

ATKYNS, *Juſtice*, agreed with WYNDHAM. Indeed when a place is named in legal proceedings, we do *primâ facie* intend it of a vill if nothing appear to the contrary; *Stabitur præſumptioni donec probetur in contrarium.* In this caſe the evidence of the thing itſelf is to the contrary: the reaſon why *primâ facie* we intend it of a vill, is, becauſe as to civil purpoſes the kingdom is divided into vills: we do not intend it of a pariſh, becauſe the diviſion of the *kingdom into pariſhes is an eccleſiaſtical diſtribution to ſpiritual purpoſes. But the law in many caſes takes notice of pariſhes in civil affairs, and cuſtom having by degrees introduced it, we may allow of it in a recovery as well as in a fine.

*[252]

SCROGGS *accordant.* If an infant levy a fine, when he becomes of full age he ſhall be bound by the deed that leads the uſes of the fine, as well as by the fine itſelf, becauſe the law looks upon both as one aſſurance.—SO THE COURT was of opinion, that the lands did paſs.

IT WAS THEN SUGGESTED, That judgment ought not to be given notwithſtanding, for that the plaintiff was dead *(a)*.—But they ſaid they would not ſtay judgment for that, as this caſe was; for between the leſſor of the plaintiff and the defendant there was another cauſe depending, and tried at the ſame aſſizes when this iſſue was tried; and by agreement between the parties the verdict in that cauſe was not drawn up, but agreed that it ſhould enſue the determination of this verdict, and the title to go accordingly. Now the ſubmiſſion to this rule was an implicit agreement not to take advantage of ſuch occurrences as the death of the plaintiff in an ejectment, whom we know to be no wiſe concerned in point of intereſt, and many times but an imaginary perſon.

The death of *the plaintiff* in ejectment ſhall not abate the action, eſpecially if there be another perſon of the ſame name; for the court will take notice that it is *the leſſor* of the *plaintiff* who is concerned in intereſt.
5. Mod. 33.
1. Sid. 24.
3. Keb. 372.
12. Mod 653.
2. Stra. 899.
1056.
1. Ld. Ray. 244.
Run. Eject. 139.
Salk. 260.

It was ſaid alſo to have judgment, that there lived in the county where the lands in queſtion are, a man of the ſame name with him that was made plaintiff.—This THE COURT ſaid was ſufficient, and that were there any of that name, *in rerum naturâ* they would intend that he was the plaintiff.

PER CURIAM. We take notice judicially, that *the leſſor* of the plaintiff is the perſon intereſted, and therefore we puniſh the plaintiff if he releaſe the action or releaſe the damages.—Accordingly judgment was given.

(a) By 17. Car. 2. c. 8 the death of either party between verdict and judgment ſhall not be alledged for error, ſo as judgment be entered within two Terms after the verdict. If the judgment be ſigned, though not entered on the roll, or if the death happen after the commencement of the aſſizes, though before trial, it is within the remedy of the ſtatute. 1. Sid. 385. 1. Salk. 8.

Anonymous.

Caſe 10.

* Anonymous.

If two actions be brought againſt an heir on two ſeveral bonds by his anceſtor, the plaintiff who firſt ſigns judgment ſhall have priority of execution, although his action was not firſt commenced.

Ante, 2. Keilw. 63. 22. Mod. 146. 1. Ld. Ray. 252. 2. Peer. Wms. 295. 3. Peer. Wms. 399. 3. Bac. Ab. 26. 1. Term Rep. 729. 4. Term Rep. 402.

DEBT UPON AN OBLIGATION was brought againſt the heir of the obligor; hanging which action, another action was brought againſt the ſame heir upon another obligation of his anceſtor. Judgment is given for the plaintiffs in both actions: but the plaintiff in the ſecond action obtains judgment firſt: and Which ſhould be firſt ſatisfied? was the queſtion.

BARRELL, *Serjeant.* He ſhall be firſt ſatisfied that brought the firſt action.

NORTH, *Chief Juſtice.* It is very clear, that he for whom the firſt judgment was given ſhall be firſt ſatisfied; for the land is not bound till judgment be given (*a*). But if the heir, after the firſt action brought, had aliened the land which he had by deſcent (*b*); and the plaintiff in the ſecond action, commenced after ſuch alienation, had obtained judgment, and afterward the plaintiff in the firſt action had judgment likewiſe; in that caſe the plaintiff in the firſt action ſhould be ſatisfied, and he in the ſecond action not at all.

BARRELL, *Serjeant.* What if the ſheriff return in ſuch a caſe, that the defendant has lands by *deſcent*, which in fact are of his own *purchaſe*?—NORTH, *Chief Juſtice.* If the ſheriff's return cannot be traverſed, at leaſt the party ſhall be relieved in an ejectment.

(*a*) *Sed vide* the caſe of Gree v. Oliver, Carth. 245. where it is ſaid, that this caſe is not law. But by 29. Car. 2. c. 3. ſ. 14. & 15. "Any "judge or officer of the courts at "Weſtminſter, that ſhall ſign any "judgments, ſhall at the ſigning of the "ſame ſet down the day of the month "and year of his ſo doing upon the pa-"per-book, docket, or record, which he "ſhall ſign; which ſhall alſo be entered "on the margent of the roll: and ſuch "judgments as againſt purchaſors *bona* "*fide* for valuable conſideration of lands, "tenements, or hereditaments, to be "charged thereby, ſhall in conſideration "of law be judgments only from ſuch "time as they ſhall be ſo ſigned, and "ſhall not relate to the firſt day of the "Term whereof they are entered, or the "day of the return of the original, or "filing the bail: and no writ of *fieri* "*facias*, or other writ of execution, "ſhall bind the property of the goods, "but from the time that ſuch writ ſhall "be delivered to the ſheriff."

(*b*) By 3. & 4. Will. & Mary, c. 14. ſ. 5. "If any heir liable to pay the debt "of an anceſtor, in regard of lands, &c. "deſcending upon him, ſhall alien them "before action brought, he ſhall be "liable to the amount of their value."

Caſe 11.

The King *againſt* Thorneborough and Studly.

A recovery in *quare impedit* againſt a clerk whom the king preſented by uſurpation avoids the uſurpation.

Ante, 204. 230. 248. Poſt. 276. 2. Roll. Abr. 370. 6. Co. 29. 5. Co. 59. Co. Lit. 344. Cro. Eliz. 240. 519. 1. Leon. 226.—Jones, 46. Vaugh. 14. Hob. 316.

THE KING brought a *quare impedit* againſt the *Biſhop of* and *Thorneborough* and *Studly*; and declares, That *Queen Elizabeth* was ſeiſed in fee of the advowſon of *Redriff*, in the county of *Surrey*, and preſented *J. S.*: that the queen died, and the advowſon deſcended to *King James*, who died ſeiſed, &c. and brings down the advowſon by deſcent to the king that now is. *Thorneborough* the patron pleads a plea in bar; upon which the

king

king * demurs. *Studly* the incumbent pleads, confeſſing *Queen Elizabeth's* ſeiſin in fee in right of her crown; but ſays, that ſhe, in the ſecond year of her reign, granted the advowſon to one *Boſbill*, who granted to *Ludwell*, who granted to *Danſon*, who granted to *Hurleſtone*, who granted to *Thorneborough*, who preſented the defendant *Studly*; and traverſeth, ABSQUE HOC that *Queen Elizabeth* died ſeiſed.

The defendant's counſel produced the letters patents made by *Queen Elizabeth* in the ſecond year of her reign to *Boſbill* and his heirs.

The king's counſel gave in evidence a preſentation made by *Queen Elizabeth* by uſurpation in the thirty-fourth year of her reign, of one *Rider*, by which preſentation the advowſon was veſted again in THE CROWN. The preſentation was read in court, wherein the queen recited that the church was void, and that it appertained to her to preſent.

NORTH, *Chief Juſtice.* Is not the queen deceived in this preſentation? for ſhe recites, that it belongs to her to preſent, which is not true. If the queen had intended to make an uſurpation, and her clerk had been inſtituted, ſhe had gained the fee-ſimple; but here ſhe recites, that ſhe had right.

MAYNARD, *Serjeant.* When the king recites a particular title, and has no ſuch title, his preſentation is void; but not when his recital is general, as it is here. And this difference was agreed to in the king's bench, in the caſe of one *Eraſmus Dryden.*

The defendant's counſel ſhewed a judgment, in a *quare impedit*, againſt the ſame *Rider*, at the ſuit of one *Wingate*, in *Queen Elizabeth's* time; whereupon the plaintiff had a writ to the biſhop, and *Rider* was ouſted. *Wingate* claimed under the letters patents of the ſecond of the queen, *viz.* by a grant of one *Adie* to himſelf; to which *Adie* one *Ludwell* granted it, in the thirty-third year of *Queen Elizabeth's* reign.

BALDWIN, *Serjeant.* It appears by the record of this judgment, that a writ to the biſhop was awarded; but no final judgment is given, which ought to be after the three points of the writ inquired.

NORTH, *Chief Juſtice.* What is it that you will call the final judgment? There are two judgments in a *quare impedit*; one, that the plaintiff ſhall have a writ to the biſhop, which is the final judgment, that goes to *the right* betwixt the parties; and the judgment at the common law. There is another * judgment to be given for the damages ſince the ſtatute of *Weſtminſter* 2. c. 5. after the points of the writ are inquired of; which judgment is not to be given but at the inſtance of the party. * [255] 5. Co. 59. a.

PEMBERTON. This *Wingate* who recovered was a ſtranger, and had no title to have a *quare impedit.* Now I take this difference, Where the king has a good title, no recovery againſt his clerk ſhall affect the king's title; he ſhall not be prejudiced by a

THE KING *againſt* THORNBOROUGH AND STUDLY.

recovery to which he is no party. If the king have a defeaſible title, as in our caſe, by uſurpation; there, if the rightful patron recover againſt the king's incumbent, the king's title ſhall be bound, though he be not a party; for his title having no other foundation than a preſentation, when that is once avoided, the king's title falls together with it. But though the king's title be only by uſurpation, yet a recovery againſt his clerk by a ſtranger, who has nothing to do with it, ſhall not prejudice the king: covin may be betwixt them, and the king be tried. Now *Wingate* had no right; for he claimed by grant from one *Adie*, to whom *Ludwell* granted in the thirty-third year of *Queen Elizabeth*. But we can prove this grant by *Ludwell* to have been void; for in the twenty-ninth year of the queen he made a prior grant to one *Danſon*, of which grant we here produce the inrolment. This grant to *Danſon* was an effectual grant; for in the eleventh year of *James the Firſt* a preſentation was made by *J. R.* and *Thomas Danſon*, which proves that this grant took effect; and the defendant himſelf deduceth the title of his own patron under that grant.

BARRELL, *Serjeant*. *Wingate* is not to be accounted a ſtranger; for he makes title by the letters patents granted in the ſecond year of *Queen Elizabeth*; ſo that he encounters the queen with her own grant: and his title under that grant was allowed by the Court, who gave judgment accordingly. There was no *feint pleader* in the caſe, as appears by the record that has been read; and covin ſhall not be preſumed if it be not alledged. We deduce our title under the grant made to *Danſon* in the twenty-ninth year of *Queen Elizabeth* in our plea; but that is only by way of inducement to our traverſe.

PER CURIAM. By the judgment in the time of *Queen Elizabeth* the queen's title was avoided. We muſt not preſume that *Wingate* had a title. *Ex diuturnitate temporis omnia præſumuntur ſolemniter eſſe acta.* That *quare impedit* was brought when
* [256] the * matter was freſh. Without doubt *Danſon* would have aſſerted his title againſt *Wingate*, if he had had any. The defendant did not do prudently in conveying a title to his patron, under the grant made to *Danſon*: but iſſue being taken upon the queen's dying ſeiſed, he ſhall not be concluded to give in evidence any other title to maintain the iſſue. Upon which evidence the jury found for the defendant, That *Queen Elizabeth* did not die ſeiſed.

NORTH, *Chief Juſtice*, ſaid, he was clearly of opinion, That the king's title, by uſurpation, ſhould be avoided by a recovery againſt his clerk, though the recoveror were a meer ſtranger.

By 7. Ann. c. 18. no *uſurpation* ſhall diſplace the eſtate or intereſt of any intitled to an advowſon, or turn it to a right; but ſuch perſon ſo intitled may preſent, or have a *quare impedit* on the next or any ſubſequent avoidance, as if no uſurpation had been.

The

The Company of Stationers *againſt* Seymour.

Caſe 12.

A royal patent to the Stationers Company, granting them the excluſive right of printing *almanacks*, is bad.

S. C. 3. Keb. 792. Carter, 89, 90. 2. Show. 259. 1. Vern. 120. 276. 10. Mod. 105, 131. Skin. 233. 3. Mod. 77. Moor, 673. Noy, 173. 2 Ch. Caſes, 76. 93. 3. Mod. 75. 2. Inſt. 744. 4. Bac Abr. 210. *notis.* 1 Hawk P. C. 475. 4. Burr 661. 2. Bl. Com. 410. 1. Bl. Rep. 105. 328.

THE COMPANY OF STATIONERS brought an action of debt againſt *Seymour*, for printing *Gadbury's Almanack* without their leave. Upon a ſpecial verdict found, the queſtion was, Whether the letters patents, whereby the *Company of Stationers* had granted to them the ſole printing of almanacks, were good, or not?

The jury found the ſtatute of 13. & 14. *Car.* 2. c. 33 (*a*) concerning printing. They found a patent, made by *King James*, of the ſame privilege to the Company, in which a former patent of *Queen Elizabeth* was recited; and they found the letters patents of the king that now is. Then they found, that the defendant had printed *an almanack*, which they found *in verbis et figuris*; and that the ſaid almanack had all the eſſential parts of the almanack that is printed before "The Book of Common Prayer;" but that it has ſome other additions, ſuch as are uſual in common almanacks, &c.

PEMBERTON, *Serjeant.* The king may by law grant the ſole printing of almanacks. The art of printing is altogether of another conſideration, in the eye of the law, than other trades and myſteries are. The preſs is a late invention; but the exorbitancies and licentiouſneſs thereof has, ever ſince it was firſt found out, been under the care and reſtraint of the magiſtrate; for great miſchiefs and diſorder would enſue * to the commonwealth, if it were under no regulation; it has therefore always been thought fit to be under the inſpection and controul of the government; and the ſtatute of the 13. & 14. *Car.* 2. c. 33. recites, that it is a matter of public care. In *England*, it has from time to time been under the king's own regulation, ſo that no book could lawfully be printed without an *imprimatur*, granted by ſome that derive authority from him to licenſe books. But the queſtion here is not, Whether the king may, by law, grant the ſole printing of all books; but of any, and of what ſort of books? The ſole printing of *law-books* is not now in queſtion; that ſeems to be a point of ſome difficulty, becauſe of the large extent of ſuch a patent, and the uncertainty of determining what ſhould be accounted a *law-book*, and what not; and yet ſuch a patent has been allowed to be good by a judgment in the houſe of peers (*b*). When SIR ORLANDO BRIDGEMAN was Chief Juſtice in this court, there was a queſtion raiſed concerning the validity of a grant of the ſole printing of any particular book, with a prohibition to all others to print the ſame, how far it ſhould ſtand good againſt them that claim a property in the copy, paramount to the king's grant; and opinions were divided upon the point. But the defendant, in our caſe, makes no title to the copy; only he pretends a nullity in our patent. The book which this defendant has printed, has no certain author; and then, according to the rule of our law, the king

(*a*) See the Appendix to Mr. Ruffhead's edition of the Statutes

(*b*) This ſeems to be the caſe of Roper v. Streater, Skin. 234. See alſo the caſe of Baſket v. the Univerſity of Cambridge, 1. Bl. Rep. 110. 4. Burr. 2116.

THE COMPANY OF STATIONERS *against* SEYMOUR.

has the property; and by conſequence may grant his property to the Company.

THE COURT. There is no difference in any material part betwixt this almanack and that which is put in THE RUBRICK of the common-prayer. Now the almanack that is before the common-prayer proceeds from a public conſtitution; it was firſt ſettled by the *Nicene Council*; is eſtabliſhed by the canons of the church; and is under the government of the *Archbiſhop of Canterbury*; ſo that almanacks may be accounted *prerogative copies*. Thoſe particular almanacks that are made yearly, are but applications of the general rules there laid down for the moveable feaſts for-ever, to every particular year. And, without doubt, this may be granted by the king. This is a ſtronger caſe than that of *law-books*, which has been mentioned. The lords, in the reſolution of that caſe, relied upon this, That * printing was a new invention, and therefore every man could not by the common law have a liberty of printing *law-books*. And ſince printing has been invented, and is become a common trade, ſo much of it as has been kept incloſed never was made common: but matters of ſtate, and things that concern the government, were never left to any man's liberty to print that would. And particularly the ſole printing of *law books* has been formerly granted in other reigns. Though printing be a new invention, yet the uſe and benefit of it is only for men to publiſh their works with more eaſe than they could before (*a*): men had ſome other way to publiſh their thoughts before printing came in; and foraſmuch as printing has always been under the care of the government ſince it was firſt ſet on foot, we may well preſume that the former way was ſo too.—QUEEN ELIZABETH, KING JAMES, and KING CHARLES THE FIRST, granted ſuch patents as theſe, and the law has a great reſpect to common uſage. We ought to be guided in our opinions by the judgment of the houſe of peers; which is expreſs in the point; the ultimate reſort of law and juſtice being to them. There is no particular author of an almanack; and then, by the rule of our law, THE KING has the property in the copy. Thoſe additions of prognoſtications and other things that are common in almanacks, do not alter the caſe; no more than if a man ſhould claim a property in another man's copy, by reaſon of ſome inconſiderable additions of his own.—Accordingly judgment was given for the plaintiffs, *niſi cauſa*, &c. (*b*).

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(*a*) See 8. *Ann.* c. 19. and the caſe of Literary Property, 4. Burr.

(*b*) But ſee the caſe of the Stationers Company *v.* Carnan, where, on a caſe out of chancery, it is certified by the Judges of the Common Pleas—FIRST, That the grant made to the Company by *James the Firſt* for the excluſive printing of all almanacks allowed by the *Archbiſhop of Canterbury* and *Biſhop of London*, is reſtrained to ſuch almanacks only as ſhould be allowed by the ſaid *archbiſhop* and *biſhop*, or either of them, for the time being.—And, SECONDLY, that the crown has not a prerogative or power to make ſuch a grant to THE COMPANY, excluſive of any other or others. Eaſter Term, 15. *Geo.* 3. 2. Bl. Rep. 1009.

Walwyn

Walwyn *againſt* Awberry and Others. Caſe 13.

ACTION OF TRESPASS for taking away four loads of wheat, four loads of rye, four loads of barley, four loads of beans, and four loads of peaſe. The defendant as to part pleaded *not guilty*; and as to the other part *juſtified*, For that the plaintiff is rector of the rectory impropriate of *Bradwardyne* in the county of *Hereford*, and ſo bound to repair the chancel; and that the chancel being out of repair, the *Biſhop of Hereford*, after monition to * the plaintiff to repair the ſame, had granted a *ſequeſtration* of the tithes, &c. of the rectory; and that the defendants, being churchwardens, had taken them into their hands, and ſo juſtified by virtue of *the ſequeſtration*. To which the plaintiff demurred.

A juſtification in treſpaſs, that the plaintiff was the rector of ſuch a church, and that the goods were taken under a *ſequeſtration* of the profits of the rectory, for the reparation of *the chancel*, muſt aver, that no more was taken than was neceſſary to the expence of reparation. But the profits of *a lay-impropriation* cannot be ſequeſtered for the repair of the chancel.

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BARRELL, *Serjeant*. I do not deny but that the rector of a rectory impropriate may perhaps be bound of common right to repair the chancel. But ſince the ſtatutes of 31. *Hen.* 8. c. 13. and 32. *Hen.* 8. c. 7. have converted the tithes of ſuch rectories into lay-fees, they have conſequently exempted them from the juriſdiction of the ordinary. A doubt was conceived upon the ſtatute of 31. *Hen.* 8. c. 13. whereby penſions, proxies and ſynodals are ſaved, what remedy lay for the recovery of them; and it was therefore provided by the ſtatute 32. *Hen.* 8. c. 7. that the church ſhould be ſequeſtered. The poſſeſſions of eccleſiaſtical perſons were ſubjected to the juriſdiction of THE ORDINARY, and might be ſequeſtered in many caſes by proceſs out of the biſhops courts: but whenever the poſſeſſions of laymen were charged with any eccleſiaſtical payment or ſpiritual charge, the ordinary could not take the land into his hands, nor meddle with the poſſeſſion thereof in any ſort; but the conſtant uſage was to compel the perſons by eccleſiaſtical cenſures. In the year 1570, there was application made to the queen to provide a remedy for the reparation of the chancels of ſuch churches whereof the parſonages were impropriated. Moreover, he ſaid, a ſequeſtration does not bind the intereſt, nor put the rector out of poſſeſſion; the not ſubmitting to it is only matter of contempt; and it can no more be pleaded in bar to an action of treſpaſs, than a ſequeſtration out of chancery.

S. C. 2. Mod. 254. S. C. 3. Keb. 829. S. C. 2. Vent. 35. S. C. 1. Freem. 230. Ante, 216. 229. 2. Mod. 77. 1. Vent. 5. Hard. 188. 8. Mod. 338. 10. Mod. 12. 1. Ld. Ray. 59. 1. Vern. 160. 247. 421. 1. Peer. Wms. 307. 535. 2. Peer. Wms. 261. (621). 3. Peer. Wms. 240. 379. See 2. Danv. 620, 621.

ATKYNS, *Juſtice*. I hope not to ſee it drawn in queſtion, Whether *a ſequeſtration* out of chancery may be pleaded in bar to an action of treſpaſs at the common-law, or no? but if it were pleaded, I think we need not ſcruple to allow ſuch a plea, by reaſon the court of chancery at *Weſtminſter* preſcribes to grant ſuch a proceſs; which is a court of ſuch antiquity, that we ought to take notice of their cuſtoms.

4. Com. Dig. "Prohibition" (G 2.). 2. Mod. 258. 2. Chan. Ca. 44. 1. Peer. Wms. (621). Vern. 421.

BALDWIN, *Serjeant*, *contra*, cited *Fitzherbert's Naturæ Brevium* (*a*); *the Regiſter of Original Writs* (*b*); the ſtatute of *Cir-*

(*a*) F. N. B. 50. (*b*) Reg. 44. b. 48. a.

WALWYN *againſt* AWBERRY AND OTHERS.

cumſpectè Agatis (a); *Diathan's* Commentary upon the Legatine Conſtitutions of *Othobone*, title "*Ne prælati fructus eccleſiarum* "**vacantium perciperent*;" LINDEWOOD, *de ædificand. eccleſiis (b)*, where it is ſaid, The reparation of the chancel is *onus reale, impoſitum rebus, non perſonis*; and *Cawdrie's Caſe (c)*: he alſo cited the ſtatute of 25. *Hen.* 8. c. 19. *Sir John Davies's Reports* 70. *Vaughan*, 327. *Reg. Jud.* 22. 26. the Year Book 13. *Hen.* 4. pl. 17. 21. *Hen.* 6. pl. 16. b.; and the ſtatute 28. *Hen.* 8. c. 9.

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2. Danv. 617. pl. 5, 6.

It is objected, That theſe tithes are become a lay-fee. To which I anſwer, That by the ſtatute of 32. *Hen.* 8. c. 7. there is a remedy given for them in the ſpiritual court. It is enacted indeed, that fines and recoveries may be ſuffered of them, as of lands and tenements, but they are not made lay-fees to other purpoſes.

Co. Lit. 159. b.

No ſtatute exempts them from the juriſdiction of the ordinary, nor diſcharges the *onus reale*. The ſaving in the ſtatute of 31. *Hen.* 8. c. 13. preſerves the power of ſequeſtration, as well as other particulars there inſtanced; for "all rights of any perſon "or perſons, their heirs and ſucceſſors, is ſaved, &c." The ſaving is large. The pariſhioners have a right in the chancel, and to have it kept in repair; for the communion-table is to ſtand there, though they have not *jus ſepulturæ* there. The practice is with us. And this is the firſt inſtance of diſobedience to ſuch a ſequeſtration. Beſides, there are many impropriations in the hands of deans and chapters, and bodies politic, which cannot be excommunicated: What proceſs will you grant againſt them but ſequeſtration? I do not mean appropriations; to wit, ſuch rectories as were appropriated to them before the diſſolution of monaſteries, and have continued ſo to this day; for there is no queſtion but the ordinary may ſequeſter them; but I mean ſuch impropriations as they have purchaſed of the king and his patentees ſince the diſſolution.

NORTH, *Chief Juſtice*. The biſhop is in the nature of an eccleſiaſtical ſheriff. If an action of debt were brought againſt a clerk, and the ſheriff had returned upon a *fieri facias*, that the defendant was *clericus beneficiatus non habens laicum feodum*, there iſſued a *fieri facias* to the biſhop, upon which he uſed to ſequeſter (as they call it) the eccleſiaſtical poſſeſſions of the defendant: but that is not properly a ſequeſtration; for the ordinary muſt not return *ſequeſtrari feci*; he muſt return *fieri feci* or *nulla bona*, in like manner as a ſheriff of a county muſt do: this I have known in experience, that a biſhop has been ordered in ſuch a caſe to amend * his return. The reaſon of this proceſs was, becauſe the poſſeſſions of eccleſiaſtical perſons were ſo diſtinct from temporal poſſeſſions, that they could not be ſubject to the ordinary proceſs of the temporal law, no more than poſſeſſions of laymen could be ſubject to their juriſdiction. And therefore

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(a) 31. Edw. 1. c.
(b) Page 156.
(c) 5. Co. 1. 2. Ander. 122. Poph. 59.

rectories

rectories impropriate being now incorporated into the common law, and converted into lay fees, it ſhould ſeem to me, that they are thereby exempted from the juriſdiction of the ordinary: and this I take to be within the reaſon of *Jeffries's Caſe* (*a*), where temporal perſons that are liable to contribute towards the repairs of the church out of their temporal poſſeſſions, are ſaid to be compellable thereunto by eccleſiaſtical cenſures. It has been ſaid, that the pariſhioners have a right in the chancel; but I queſtion that: it is called *cancellum*, *a cancellis*, becauſe the pariſhioners are barred from thence: it is the right of the parſon.

WYNDHAM, *Juſtice*, thought, that by the ſaving in the ſtatute of 31. *Hen.* 8. c. 13. the juriſdiction of the ordinary was preſerved. 1. Ld. Ray. 59.

ATKYNS, *Juſtice*. The parſon was chargeable with the reparation of the chancel in reſpect of the profits which he received: they were the proper debtors. Now I think it may be held, that the impropriation affects only the ſurpluſage of the profits over and above all charges and duties iſſuing out of the parſonage, and wherewith it was originally charged: the reparation of the chancel is a right ariſing from the firſt donation; which ſhall not be taken away but by expreſs words.—SCROGGS *accordant*.

NORTH, *Chief Juſtice*. The defendant's plea is naught; for the cauſe of their juſtification is, that what they did was in executing a ſequeſtration, whereby they were authoriſed to take into their hands the profits of the rectory for the reparation of the chancel; now they ought to aver, that they did not take into their hands more than was ſufficient for the reparation thereof.—If the law come to be taken as my brothers are of opinion, it will make a great ſtep to the giving ordinaries power to encreaſe vicarages; for the pariſhioners have a right to a maintenance for one to preach to them.—*Adjournatur* (*b*).

(*a*) 5. Co. 66. Cro. Eliz. 659. Aſton's Ent. 441.

(*b*) The Court gave judgment upon the informality of the plea; but it is ſaid, S. C. Yentris, 35. that the Court inclined, and S. C. 2. Mod. 257. that all the Juſtices, except ATKYNS, were of opinion, that as impropriations are now lay fees, they cannot be ſequeſtered for the reparation of the chancel.—*Sed vide* 3. Keble, 829. Gibſon, 199. *contra*. See alſo 1. Burn's Eccl. Law, 324.

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* Edwards *againſt* Weeks.

Caſe 14.

A *parol* agreement may be diſcharged by *parol* before the cauſe of action accrues.

ACTION UPON THE CASE. The plaintiff declares, That the defendant, in conſideration that the plaintiff would deliver to him ſuch a horſe, promiſed to deliver to the plaintiff in lieu thereof another horſe, or five pounds upon requeſt: and avers, that the plaintiff had delivered to the defendant the ſaid horſe, and had requeſted

S. C. 2. Mod. 259. Ante, 206. 1. Sid. 177. 293. 2. Leon. 214. 1. Roll. Abr. 450. 2. Roll. Abr. 408. Cro. Jac. (620). 483. 2. Mod. 44. 4. Mod. 250. 3. Lev. 244. 4. Bac. Abr. 265. 1. Com. Dig. 151. 1. Term Rep. 133.

EDWARDS *againſt* WEEKS.

queſted him, &c. The defendant pleads, that the plaintiff, before the action brought, diſcharged him of that promiſe, but ſays not how: to which the plaintiff demurred.

STRODE, *Serjeant*. If he had pleaded a diſcharge before the requeſt made, the plea had been good without ſhewing how he diſcharged him: but after the requeſt once made, a verbal diſcharge is not ſufficient; and he cited the caſe of *Langden v. Stokes*, *Cro. Car.* 384. and the Year Book of 22. *Edw.* 4. 40. b.—

THE COURT agreed and gave judgment for the plaintiff, *niſi cauſa*, &c.

Caſe 15.

Barker *againſt* Keate.

If a conveyance be made, though without any pecuniary conſideration, by the words "*demiſe* "*and grant*," with the reſervation of *a pepper corn*, for the purpoſe of receiving a releaſe of the inheritance, the conſideration of a pepper-corn is good to raiſe *a uſe* in the grantee, and make the lands paſs by way of bargain and ſale.

EJECTMENT of land in *Caſtle Acre* in the county of *Norfolk*. The defendant pleaded *not guilty*; and the iſſue was found as to part; and for the reſidue there was a ſpecial verdict:

That *Edmund Hudſon* was ſeiſed to him and the heirs males of his body, the remainder to *William Hudſon* his brother, and the heirs males of his body: that *Edmund Hudſon* by indenture betwixt himſelf and *Thomas Peeps* demiſed to *Thomas Peeps* from the feaſt of *St. Michael* then laſt paſt for ſix months, rendering a *pepper-corn* rent; and that afterwards by another indenture between himſelf on the one part, and *Thomas Peeps* and *Edward Bromley* on the other part, reciting the ſaid leaſe, he bargained and ſold the reverſion to *Thomas Peeps*, his heirs and aſſigns, to the intent to make him tenant to the *præcipe* in order to the ſuffering of a common recovery, in which *Edmund Bromley* was to be the recoveror, and himſelf the ſaid *Edward Hudſon* the vouchee; and that this recovery was to be to the uſe of *Edmund Hudſon* and his heirs, &c. And the jury made a ſpecial concluſion, *viz.* That if the Court ſhould adjudge that * in this recovery there were a good tenant to the *præcipe*, then they found for the plaintiff; otherwiſe for the defendant.

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S. C. 2. Mod. 249. S. C. 1. Freem. 249. Ante, 175. 2. Roll. Abr. 781. Cro. Car. 110. Cro. Jac. 604. Carter, 66. 1. Co. 154. Hob. 151. Fitzg. 301. 10. Mod. 421. 436. 533. 13. Mod. 162. Sanders on Uſes and Truſts, 443. 451. 469.

WALLER, *Serjeant*, argued, That there was no good tenant to the *præcipe*; for that *Thomas Peeps* never was in poſſeſſion, by virtue of the leaſe, for ſix months. No entry is found, nor no conſideration to raiſe an uſe. All the conſideration mentioned, is the reſervation of a pepper-corn; which is not ſufficient; for it is to be paid out of the profits of the land. He compared it to *Colyer's Caſe* (*a*), where a ſum in groſs appointed to be paid by the deviſee, gave him an eſtate in fee ſimple; but a ſum to be paid out of the profits of the land, not. He cited *Lord Pagett's Caſe* (*b*), and the caſe of the *Abbot of Bury v. Bokenham* (*c*). Beſides,

(*a*) 6. Co. 16. Cro. Eliz. 378. 1. Leon. 194. 1. Andr. 259. 1. Co. 154. Jenk. 247.
(*b*) 2. Roll. Abr. 784. Moor, 193.
(*c*) Dyer, page 8. pl. 31.

the

the conſideration, in our caſe, is a thing of no value, being but a ſingle pepper-corn. If an infant make a leaſe for years, rendering rent, the leaſe is but *voidable*; but if an infant make a leaſe for years, rendering a roſe, or a pepper-corn, or any ſuch-like triſle, the leaſe is *void*: and he cited *Fitzherbert tit.* "*Entry con-* "*geable*" 26.

BARKER *againſt* KEATE.

Hob. 151. 1. Co. 154. 3. Mod. 310. 3. Burr. 1794.

NORTH, *Chief Juſtice*. When a tenant for life, or years, aſſigns his eſtate, there needs no conſideration. In ſuch caſe the tenure and attendance, and the being ſubject to the ancient forfeiture, and the payment of rent, if there were any, is ſufficient to veſt the uſe in the aſſignee: but otherwiſe in caſe of a fee-ſimple. When a man is ſeiſed in fee, and makes a leaſe for years, unleſs he give poſſeſſion, and the leſſee enter, he muſt raiſe an uſe. But in our caſe the reſervation ſeems not ſufficient to raiſe an uſe; for an uſe muſt be raiſed, and the land united to it, before a rent can reſult out of it.

2. Rol. 781. pl. 7.

WYNDHAM, *Juſtice*. It being in the caſe of a common recovery, we muſt ſupport it, if it be poſſible. In the caſe of *Sutton's Hoſpital*, 10. *Co.* 34. a. it is ſaid, that the reſervation of twelve-pence rent, was a ſufficient conſideration to veſt an uſe in the hoſpital; and a rent of twelve-pence is as inconſiderable a matter in conſideration of a great eſtate, as a pepper-corn in our caſe. The caſe in *Dyer*, of the *Abbot of Bury v. Bokenham*, that has been cited, is made *a quære* in the book. I think the reſervation of a rent would have changed an uſe at the common law, and will raiſe an uſe at this day. If a feoffee to an uſe had made a feoffment in fee rendering rent, the feoffment (I conceive) would have been to the uſe of the ſecond feoffee, and the firſt uſe deſtroyed.

The other two Juſtices delivered no opinion.

* At another day, the cauſe being moved again, NORTH, *Chief Juſtice*, ſaid, he had looked upon the precedent quoted out of the caſe of *Sutton's Hoſpital*, and that there the reſervation of a rent was mentioned in the deed as a conſideration to raiſe an uſe, which, he ſaid, would perchance make a difference betwixt that caſe and this. But THE COURT would adviſe further *(a)*.

* [264]

(*a*) In the Michaelmas Term following, the unanimous opinion of the whole Court was, that the word "grant" was ſufficient to paſs the land by way of uſe; that the reſervation of a pepper-corn was a ſufficient conſideration to raiſe an uſe to ſupport a common recovery; and that the leaſe being within the 27. Hen. 8. c. 10. there was no neceſſity for an actual entry to make the leſſee capable of *a releaſe*; for being in poſſeſſion by the ſtatute, it ſhall be conſtrued an actual poſſeſſion, and ſo a good tenant to the *præcipe*: and judgment was given accordingly. S. C. 2. Mod. 253. See alſo 3. Mod. 310. Sanders on Uſes and Truſts, 443. 451. 469. and the 14. Geo. 2. c. 20.

Case 16.

Baſſett *againſt* Baſſett.

A condition "if *A.* within ſix months after the death of *B.* ſhall aſſure *an annuity* of twenty pounds to *C.* as the counſel of *C.* ſhall adviſe, at the proper coſts of *C* if he ſhall require the ſame, or if *A.* ſhall not aſſure the ſaid annuity, that then if he pay to *C.* the ſum of three hundred pounds the obligation ſhall be void," is not broken unleſs *C.* within ſix months after the death of *B.* tender an aſſurance of the annuity to *A.*; for as the aſſurance was to be at his coſts, it is incumbent on him to requeſt *A.* to grant the annuity.

* [265]

S. C. 1. Freem. 228.
S. C. 2. Mod. 200.
2. Danv. 78. 84.
Moor, 357. 241.
Cro. Eliz. 398. 539. 864.
1. Ro. Ab. 447.
Co. Lit. 225.
Cro. Eliz. 398. 864.
3. Lev. 177.
5. Co. 22.
2. Mod. 200. 304.
2. Ld. Ray. 1095. 1140. 1459.
3. Bac. Abr. 708.

AN ACTION OF DEBT upon an obligation of ſix hundred pounds penalty. The condition was, "That if the above-bounden *John Baſſett*, his heirs or aſſigns, ſhall within ſix months after the death of *Mary Baſſett*, his mother, ſettle upon and aſſure unto *Hopton Baſſett*, as the counſel of the ſaid *Hopton Baſſett*, learned in the law, ſhall adviſe, at the coſts and charges of the ſaid *Hopton Baſſett*, an annuity or rent-charge of twenty pounds *per annum*, payable half-yearly by equal portions, from the death of the ſaid *Mary*, during *Hopton Baſſett's* life, if he the ſaid *Hopton Baſſett* require the ſame, at the dwelling-houſe of the ſaid *John Baſſett*; or if he ſhall not grant the ſame, if then the ſaid *John Baſſett* ſhall pay unto *Hopton Baſſett* within the time aforementioned three hundred pounds, then the obligation to be void."—The defendant pleaded, that the plaintiff *(to wit,* the ſaid *Hopton Baſſett)* had not tendered any grant of an annuity, within the time of ſix months after the death of his mother, according to, &c. The plaintiff replied. The defendant rejoined. But the counſel on both ſides and THE COURT agreed, that the whole queſtion aroſe upon the plea in bar.

STRODE, *for the defendant.* The plaintiff ought to have tendered us a grant of annuity, to be ſealed within ſix months, &c. and having neglected that, he has diſpenſed with the whole condition. For, FIRST, This is not a disjunctive condition; but the payment of three hundred pounds is as a penalty impoſed upon him, if he refuſe to make ſuch a grant. "And if he ſhall not, &c." inſtead of the word "not," put the words "refuſe to, &c." and the caſe will be out of doubt. Beſides, the annuity to be granted is but twenty pounds a-year for a life, and three hundred pounds in money is * more than the value of it; ſo that it cannot be intended a ſum to be paid in lieu or recompence of it, but muſt be taken for a penalty. But ſuppoſe it to be a disjunctive condition *(a)*, then we ought to have an election whether we would do; but as this caſe is, the plaintiff by his negligence has deprived us of our election: for authorities he cited *Gerningham v. Ewer*, *Cro. Eliz.* 396. and 539. the Year Book 4. *Hen.* 7. *fol.* 4. *Laughter's Caſe*, 5. *Co.* 21. b. and *Warner v. Whyte*, reſolved the day before in the king's bench. There is a rule laid down in *Morecomb's Caſe*, *Moor*, 645. which makes againſt me; but the reſolution of that caſe is law, and there needed no ſuch rule: that caſe goes upon the reaſon of *Lamb's Caſe*, 5. *Co.* When a man is obliged to pay ſuch a ſum as *J. S.* ſhall aſſeſs, *J. S.* being a mere ſtranger, the obligor takes upon him that *J. S.* ſhall aſſeſs a ſum in certain; and he muſt procure him to do it, or he forfeits his obligation. But in our caſe nothing is to be done but by the obligee himſelf.

PEMBERTON *contra.* He argued that the obligor's election is not taken away; for though no deed were tendered him, he might

(*a*) 2. Mod. 304.

have

have got one made, and the tender of that would have diſcharged the condition of his bond. Indeed this will put him to charge, but he may have an action of debt for what he lays out: he cited the caſes cited by WALMESLEY in *Moor*, 645. betwixt *Milles v. Wood*; and *Gower's Caſe*, 38 & 39. *Eliz. &c.* BASSETT *againſt* BASSETT.

NORTH, *Chief Juſtice.* The caſe of *Warner v. White* adjudged yeſterday in the court of king's bench, is according to law. The condition there was, that *J. S.* ſhould pay ſuch a ſum upon the 25th of *December*, or ſhould appear in *Hilary Term* after, in the court of king's bench. *J. S.* died after the twenty-fifth day of *December* and before *Hilary Term*, and had paid nothing upon the twenty-fifth of *December:* in that caſe the condition was not broken by the non-payment, and the other part became impoſſible by the act of God: but I think, that if the firſt part of a condition be rendered impoſſible by the act of God, that the obligor is bound to perform the other part. But in the caſe at the bar the obligor's election is taken away by the act of the obligee himſelf; and I ſee no difference betwixt this caſe and that of *Gerningham v. Ewer* in *Cro. Eliz.* 396. If the condition of an obligation be ſingle, to make ſuch aſſurance as ſhall be adviſed by the counſel of the obligee; there "*conſilium non dedit adviſamentum*" is a good plea; and the obligor is not bound to * make an aſſurance of his own head; no more ſhall he be bound to do it when the condition is in the diſjunctive, to ſave his bond. In both caſes the condition refers to the manner of the aſſurance; and it muſt be made in ſuch manner as the words of the condition import. So he ſaid he was of opinion againſt the plaintiff. * [266]

WYNDHAM, *Juſtice.* Where the condition of an obligation is in the diſjunctive, the obligor muſt have his election: but in this caſe there is no ſuch thing as a diſjunctive, till ſuch time as there be a requeſt made to ſeal a deed of annuity; and then the obligor will have an election, either to execute the aſſurance, or to pay the three hundred pounds; but no ſuch requeſt being made, it ſhould ſeem that the obligor muſt pay the three hundred pounds at his peril.

ATKYNS, *Juſtice*, agreed with THE CHIEF JUSTICE, and ſo did SCROGGS, *Juſtice.*—Wherefore judgment was ordered to be entered againſt the plaintiff, *niſi cauſa, &c.* within a week.

Anonymous. Caſe 17.

QUERE IMPEDIT. The plaintiff declared upon a grant of the advowſon to his anceſtor; and in his declaration ſays, *hic in curiâ prolatâ (a)*, but indeed had not the deed to ſhew.

In pleading a *grant* of an advowſon, with a *profert* of the deed, the Court on *oyer* will not admit a copy, although the original is in the hands of the other party. 10. Co. 92. 1. Sid 386. 1. Saund. 9. 8. Mod. 75. 322. 9. Mod. 66. 10. Mod. 8. 42. 74. 108. 126. 292. 507. 515. 12. Mod. 24. 394. 414. 494. 500. 579. 2. Vern. 471. 591. 603. Prec. in Chan. 116. Abr. Eq. 228. 1. Ld. Raym. 153. 746. 2. Ld. Raym. 763. 967. 1126. 1536. 1. Stra. 401. 526. 2. Stra. 1186. 1198. 1241. 1. Wilſ. 16.; and ſee the caſe of Matiſon v. Atkinſon, and Totty v. Neſbit, 3. Term Rep. 153. *notis*; and Atkinſon v. Leonard, 3. Brown's Caſ. Chan. 223. 1. Cromp. Prac. 137. Dougl. 476.

(a) See the Statues 16. & 17. Car. 2. c. 8. and 4. & 5. Ann. c. 16.

ANONYMOUS. BALDWIN, *Serjeant*, brought an affidavit into court, that the defendant had gotten the deed into his hands, and prayed that the plaintiff may take advantage of a copy thereof which appeared in an inquiſition found in the reign of *Edward the Sixth*.

THE COURT. When an action of debt is brought upon a bond to perform covenants in a deed, and the defendant cannot plead "covenants performed" without the deed, becauſe the plaintiff has the original deed, and perhaps the defendant took not a counterpart of it, we uſe to grant imparlances till the plaintiff bring in the deed. And upon evidence if it be proved that the other party has the deed, we admit copies to be given in evidence. But where the law requires that the deed be procured, you have your remedy for the deed at law. We cannot alter the law, nor ought to grant an imparlance.

* [267]

Caſe 19.

* Strode *againſt* Perryer.

A. having a ſon and a grandſon, both of the name of *Robert*, deviſes land to his ſon *Robert*, and his heirs.—*Robert* the ſon dies in the life-time of the teſtator.—Afterwards the teſtator, with a view to re-publiſh his will, made a *parol declaration* of his intention that *Robert* his GRANDSON ſhould take the land by the ſaid will.—This is not a ſufficient deviſe to convey the lands to the *grandſon* by force of the will.

EJECTMENT. A man has a ſon called *Robert*. *Robert* has likewiſe a ſon called *Robert*. The grandfather deviſeth the land in queſtion to his ſon *Robert*, and his heirs. *Robert* the deviſee dies in the deviſor's life-time. Afterwards the deviſor makes a new publication of the ſame will; and declares it to be his intention, that *Robert* the grandchild ſhould take the land in queſtion *per eandem voluntatem*, inſtead of his father, and died. And all this was found by ſpecial verdict, upon a trial betwixt *Robert* the grandchild, and a daughter of the elder brother of *Robert* the firſt deviſee.

PEMBERTON. The land doth not paſs by this will. The deviſe to *Robert* became void by his death, and cannot be made good by a republication. A publication cannot alter the words of a will, ſo as to put a new ſenſe upon them. Land muſt paſs by will in writing *(a)*. *Robert* the grandſon is not within this will in writing. The grandfather's intention is not conſiderable in the caſe.

SKIPWITH *contra*. I agree the caſe of *Brett v. Rigden (b)*, to be law: but there are two great diverſities between this caſe and that. FIRST, There was no new publication. SECONDLY, In this caſe *Robert* the father and *Robert* the ſon are cognominous: he cited *Trevilian's Caſe*, *Dyer* 142, 143. *Fuller v. Fuller*, *Cro. Eliz.* 422. and *Moor* 353. *Cro. Eliz.* 493.

S. C. Freem. 292. 477. S. C. 2. Mod. 313. S. C. 1. Eq. Ab. 407. S. C. 2. Lev. 243. S. C. Pollex. 546. S. C. Ray. 408. S. C. 1. Vent. 341. S. C. 2. Jones, 135. S. C. 3. Keb. 845. S. C. 2. Show. 63. S. C. 2. Danv. 534. Plowd. 345. Moor, 353. 476. Cro. Eliz. 422. Dyer, 143. 5. Co. 68. Lutw. 735. 2. Leon. 70. Salk. 231. 8. Mod. 9. 68. 159. 10. Mod. 96. 372. 467. 520. Fitzg. 225. 246. 314. 1. Vern. 30. 2. Vern. 106. 593. 614. Gilb. Rep. 4. 11. Prec. Chan. 441. Abr. Eq. 406. Comyns, 381. 2. Peer. Wms. 136. 182. 3. Peer. Wms. 51. 354. Ld. Ray. 438. 1282. 1324. 2. Vezey, 56. 3. Com. Dig. "Deviſe" (E 5.). (N 25.). Cowp. 87. 840. 812. 1. Bro. Caſ. Chan. 296. Dougl. 31. Pow. on Dev. 676. 678. Gilb. on Dev. 90.

(a) See 29. Car. 2. c. 3. ſ. 5. *(b)* Plowd. Com. 340.

NORTH,

NORTH, *Chief Juſtice.* Without queſtion *Robert* the grandchild ſhall take by this will. If he never had had a ſon called *Robert*, or if *Robert* the ſon had been dead at the time of making the will, the grandchild would then, without diſpute, have taken by theſe words. Now a new publication is equivalent to a new writing. The grandchild is not directly within the words of the will; but they are applicable to him. He is *a ſon*, though he be not begotten by the body of the deviſor himſelf. He is ſon with a diſtinction. Our Saviour is called the ſon of *David*, though there were twenty-eight generations betwixt *David* and him. A republication may impoſe another ſenſe upon theſe words, different from what they had when they were firſt written; as, if a man deviſe all his * lands in *Dale*, and have but two acres in *Dale*, the words now extend to more than thoſe two acres; and if he purchaſe more, and die without any new publication, the new purchaſed land will not paſs; but if there were a new publication after the purchaſe, they would paſs well enough. If a man have iſſue two ſons called *Thomas*; and he makes a deviſe to his ſon *Thomas*, this may be aſcertained by an averment. Now ſuppoſe that *Thomas* the deviſee dies, living the father, and afterwards the father publiſheth his will anew, and ſays that he did intend that his ſon *Thomas*, now dead, ſhould have had his land but that now his will and intent is, that *Thomas* his younger ſon, now living, ſhall take his land by the ſame will; in this caſe, to be ſure the ſecond ſon *Thomas* ſhall take by the deviſe. Here the import of the words is clearly altered by the republication.

* [268]

ATKYNS, *Juſtice.* The words of this will would not of themſelves be ſufficient to carry the land to the grandchild, nor would the intention of the deviſor do it without them; but both together do the buſineſs. *Quæ non proſunt ſingula, juncta juvant.*

WYNDHAM and SCROGGS, *Juſtices*, differed in opinion, and the cauſe was adjourned to be argued the next Term (*a*).

(*a*) Judgment was given in the common pleas in favour of the grandſon againſt the *heir at law*; the three Juſtices, againſt SCROGGS (*ſed vide* 3. Keb. 847.), being of opinion, that the republication made it *a new will*, and that the grandſon took by the name of *ſon*. S. C. 2. Mod. 314. S. C. 1. Freem. 293. S. C. Ray. 408. But a writ of error was brought on this judgment to the king's bench; and in Hilary Term 31. Car. 2. after ſeveral arguments, SCROGGS, who was now Chief Juſtice of this court, JONES and RAYMOND, *contra* DOLBEN, were of opinion, that the grandſon could not take; for that neither the *republication* nor *parol declaration* could operate as a deviſe to him: and the judgment was reverſed. S. C. 2. Show. 66. S. C. 1. Vent. 342. S. C. 2. Mod. 314. ſo that upon this matter, ſays Pollexfen, 552. there are *four* Judges againſt *three*, and the judgment of the three ſtands; but S. C. 2. Lev. 244. *quæres*, if the judgment was reverſed; and S. C. 1. Freem. 478. ſays, it was adjourned. But ſee S. C. 2. Jones, 135. S. C. 1. Eq. Abr. 407.

Anonymous.

Caſe 20.

Anonymous.

A perſon ſuing *in forma pauperis* cannot have a *new trial*; or remove his cauſe.
Ante, 84.
8. Mod. 344.
1. Stra. 420.

NORTH, *Chief Juſtice.* A man admitted *in formâ pauperis* is not to have a new trial granted him; for he has had the benefit of the king's juſtice once, and muſt acquieſce in it. We do not ſuffer them to remove cauſes out of inferior courts. They muſt ſatisfy themſelves with the juriſdiction within which their action properly lieth.

2. Stra. 878. 891. 983. 1121.

Caſe 21.

Farrington *againſt* Lee.

To an action of *aſſumpſit* upon an *account ſtated*, the defendant may plead *the ſtatute of limitations.*

* [269]

S.C. 2. Mod. 311.
Ante, 70.
Tothil, 64.
March, 105.
12. Mod. 579.
Gilb. Eq. Rep. 224.
1. Vern. 456.
2. Vern. 695.
Abr. Eq. 304.
1. Saund. 36.
2. Saund. 66. 120. 125.
1. Stra. 556.
2. Stra. 836.
1. Peer. Wms. 732.
Gilbert's Law of Evidence, 4th edit. 189.

ASSUMPSIT. The plaintiff declares upon two *indebitatus aſſumpſits*, and a third *aſſumpſit* upon an *inſimul computâſſet.* The defendant pleaded *non aſſumpſit infra ſex annos.* The plaintiff replied, that himſelf is a merchant, and the defendant his factor; and recites a clauſe in the ſtatute 21. *Jac.* 1. c. 16. in which actions of *account* between merchants and merchants, and merchants and their factors, concerning * their trade and merchandiſe, are excepted; and avers that this money became due to the plaintiff upon an account betwixt him and the defendant concerning merchandiſe, &c. The defendant makes an impertinent rejoinder; to which the plaintiff demurs.

NEWDIGATE, *for the plaintiff.* This ſtatute is in the nature of a penal law; becauſe it reſtrains the liberty which the plaintiff has by the common-law to bring his action when he will; and muſt therefore be conſtrued beneficially for the plaintiff: the caſe of *Finche v. Lamb* is to the purpoſe. Alſo this exception of accounts between merchants and their factors, muſt be liberally expounded for their benefit; becauſe the law-makers, in making ſuch an exception, had an eye to the encouragement of trade and commerce. The words of the exception are, "other than ſuch "accounts as concern the trade of merchandiſe, &c." Now this action of ours is not indeed an action of account; but it is an action grounded upon an account. And the plaintiff being at liberty to bring either the one or the other upon the ſame cauſe of action, and one of the actions being excepted expreſsly out of the limitation of the ſtatute, the other by equity is excepted alſo. He cited *Hill.* 17. *Car.* 1. in *March's Reports*, 151. and *Sandys v. Bloodwell*, *Jones* 401. and prayed judgment for the plaintiff.

SERJEANT BALDWIN *contra.* He ſaid, it did not appear in the declaration that this action was betwixt a merchant and his factor; ſo that then the plea in bar is *primâ facie* good. And when he comes and ſets it forth in his replication, he is too late in it: and the replication is not purſuant to his declaration.

But ALL THE COURT was againſt him in this.

The

THE SERJEANT then ſaid, the ſtatute excepted actions of *account* only; and not actions upon an *indebitatus aſſumpſit*. FARRINGTON *againſt* LEE.

THE COURT. Whereas it has been ſaid by SERJEANT NEWDIGATE, that the plaintiff here has an election to bring an action of *account*, or an *indebitatus aſſumpſit*, that is falſe; for till the account be ſtated betwixt them, an action of account lies, and not an action upon the caſe.—When the account is once ſtated, then an action upon the caſe lies, and not an action * of account.—And by NORTH, *Chief Juſtice*. If upon an *indebitatus aſſumpſit* matters are offered in evidence that lie in account, I do not allow them to be given in evidence. * [270]

NORTH, *Chief Juſtice*, WYNDHAM, and SCROGGS, *Juſtices*. The exception of the ſtatute goes only to actions of account, and not to other actions. And we take a diverſity betwixt an *account current*, and an *account ſtated*. After the account ſtated, the certainty of the debt appears, and all the intricacy of account is out of doors: and the action muſt be brought within ſix years after the account ſtated.—But by NORTH, If after an account ſtated, upon the balance of it a ſum appear due to either of the parties, which ſum is not paid, but is afterwards thrown into a new account between the ſame parties, it is now ſlipped out of the ſtatute again.

SCROGGS, *Juſtice*. The ſtatute makes a difference betwixt actions *upon account*, and actions *upon the caſe*. The words would elſe have been, "all actions of account, and upon the caſe, "other than ſuch actions as concern the trade of merchandiſe." But it is otherwiſe penned; "other than ſuch actions as concern, "&c." and as this caſe is, there is no action betwixt the parties; the account is determined, and the plaintiff put to his action upon an *inſimul computâſſet*: which is not within the benefit of the exception.

ATKYNS, *Juſtice*. I think the makers of this ſtatute had a greater regard to the perſons of merchants, than the cau[illegible] of action between them. And the reaſon was, becauſe they are often out of the realm, and cannot always proſecute their actions in due time. The ſtatute makes no difference betwixt *an account current*, and *an account ſtated*. I think, alſo, that no other ſort of tradeſmen but merchants are within the benefit of this exception; and that it does not extend to ſhop-keepers, they not being within the ſame miſchief.—*Adjournatur (a)*.

(a) It appears by S. C. 2. Mod. 312. that in Trinity Term 30. Car. 2. judgment was given for the defendant.

Memorandum.

IN *Trinity Term* 30. *Car.* 2. SIR WILLIAM SCROGGS, *Juſtice* of the Common Pleas was made *Chief Juſtice* of the King's Bench, in the place of SIR RICHARD RAINSFORD.—VERE BERTIE, *Baron* of the Exchequer, was made a Juſtice of the Common Pleas; and FRANCIS BRAMPSTON, *Serjeant*, a *Baron* of the Exchequer. Ray. 244.

MICHAELMAS

MICHAELMAS TERM,

The Twenty-Second of Charles the Second,

IN

The King's Bench.

Monday, October 24, 1670.

Sir John Kelynge, *Knt. Chief Juſtice.*

Sir Thomas Twiſden, *Knt.*
Sir Richard Rainsford, *Knt.*
Sir William Moreton, *Knt.*
} *Juſtices.*

Sir Heneage Finch, *Knt. Attorney General.*
Sir Edward Turner, *Knt. Solicitor General.*

Caſe 22.

* Horn *againſt* Chandler.

Trinity Term, 22. Car. 2. Roll 1559.

An infant unmarried, and above the age of fourteen years, may bind himſelf apprentice to a freeman of *London*; and by the cuſtom of that city, the maſter ſhall have the ſame remedies againſt him on the *covenants* of the indenture as if he had been of full age.

COVENANT upon an indenture of an apprentice, wherein the defendant bound himſelf to ſerve the plaintiff for ſeven years. The plaintiff ſets forth the cuſtom of *London*, that any perſon above fourteen years of age and under twenty-one, and unmarried, may bind himſelf apprentice, &c. according to the cuſtom, and that the maſter thereupon ſhall have *tale remedium* againſt him as if he was twenty-one years of age; and alledges, that the defendant did go away from his ſervice, *per quod* he loſt his ſervice for the ſaid term, which term is not yet expired. The defendant pleads a frivolous plea; to which the plaintiff demurs.

—The cuſtom is ſufficiently alledged by the words "*tale remedium*" to ſupport COVENANT.—S. C. 2. Keb. 687. 710. S. C. 2. Danv. 460. 21. *Edw.* 4. pl. 6. Moor, 136. 2. Bulſt. 192. 2. Roll. Rep. 305. Palm. 361. Hutt. 63. Winch. 63. Yelv. 94. Allen, 23. Hob. 214. Cro. Jac. 619. Cro. Car. 179. 2. Saund. 169. 6. Mod. 69 8. Mod. 191. 9. Mod. 191. 10. Mod. 144. 149. 11. Mod. 49. 12. Mod. 415. 2. Vern. 492. 2. Peer. Wms. 288.

OFFLEY.

OFFLEY. Though ſuch a covenant ſhall not bind an infant either by common law, or by 5. *Eliz.* c. 1. yet by this cuſtom it ſhall. In *Eaſter Term*, 21. *Jac.* 1. in the king's bench, in the caſe of *Cole v. Holme*, there was ſuch an action againſt an apprentice, to which the defendant pleaded "non-age;" and the plaintiff replied "the cuſtom of *London*," and that the indenture of apprenticeſhip was inrolled as it ought to be, &c. and this was certified by SERJEANT FINCH, *the Recorder*, to be the cuſtom *(a)*, and thereupon judgment was againſt the defendant: it is a manuſcript.

HORN *againſt* CHANDLER.

(a) Dougl. 378, 381.

JONES. The cuſtom ought to have been alledged, that he ſhould have an action of covenant againſt him, which is not done here; and cuſtoms ſhall be taken ſtrictly, not by implication: moreover the plaintiff declares for a loſs not yet ſuſtained, the term not being ended.

THE COURT. The cuſtom is ſufficiently alledged to give and make good an action of covenant; the words "*tale remedium*" imply it: thoſe words are applicable to all things relating to this matter, *viz.* that the maſter may correct him, may go to a juſtice of peace, and alſo may have an action of covenant againſt him, as againſt a man of full age; and though by common law or the ſtatute his covenant ſhall not bind him, yet by the cuſtom it ſhall.

But TWISDEN, *Juſtice*, deſired to ſee *Offley's* Report of the caſe of *Cole v. Holme*. As to the declaring for the loſs of the term, part whereof is unexpired; though it has been adjudged to be naught after a verdict, yet in this caſe, which is upon demurrer, it may be helped; for the plaintiff may take * damages for the departure only, not the loſs of ſervice during the term; and then it will be well enough.—Judgment *niſi*, &c.

* [272]

Jones *againſt* Powel. Caſe 23.

WORDS ſpoken of *an attorney*, "Thou canſt not read a declaration," *per quod*, &c.—THE COURT. The words are actionable, though there had been no ſpecial damage; for they ſpeak him to be ignorant in his profeſſion, and we ſhall not intend that he had a diſtemper in his eyes, &c.—Judgment was given for the plaintiff.

To ſay of AN ATTORNEY, "*He cannot read a declaration*," is actionable, without ſpecial damage.

8. C. Ray. 196. S. C. 1. Vent. 98. S. C. 1. Lev. 297. S. C. 2. Keb. 710. Moor, 409. Godb. 441. 1. Sid. 327. Cro. Eliz. 342. 1. Roll. Abr. 52. Cro. Car. 515. Hob. 9. Latch. 21. Brownl. 16. 1. Vent. 117. Ley, 70. Strange, 1138. 3. Wilſon, 59. 4. Term Rep. 366.

Furlong *againſt* Bray. Caſe 24.

Hilary Term, 20. & 21. *Car.* 2. *Roll* 1578.

THE defendant in an action of falſe impriſonment juſtified the taking and impriſoning the plaintiff by virtue of an order of chancery, that he ſhould be committed to THE FLEET; and the

Treſpaſs cannot be juſtified under *an order* of the court of chancery.—S. C. 2. Saund. 182. S. C. 2. Keb. 711. Ante, 170. 1. Vern. 131. 1. Stra. 509. 2. Peer. Wms. 675. 701. 2. Peer. Wms. 55. 261. 483.

Fortune *againſt* Bray.

plea was judged naught, becauſe *an order* is not ſufficient. It ought to have been *an attachment* he ſhould have pleaded, *quoddam breve de attachiamento, &c.*

Caſe 25.

Oſborne *againſt* Walleeden.

Eaſter Term, 22. Car. 2. Roll 162.

If a deviſe be made of *a rent-charge* to a woman "for life, "and if ſhe "marry, his "executor ſhall "pay her 100l. "and the rent-"charge ſhall "ceaſe, and "return to the "executor;" the rent-charge ſhall not ceaſe on her marriage until ſhe 100l. be paid.

REPLEVIN. The defendant avows in right of his wife for *a rent-charge*, deviſed to her for life by her former huſband. But in the will there was this clauſe, *viz.* "If ſhe ſhall marry, "&c. he (the executor) ſhall pay her one hundred pounds, and "the rent ſhall ceaſe and return to the executor:" ſhe doth marry, and the executor does not pay the hundred pounds.

The queſtion was, Whether the rent ſhould ceaſe before the hundred pounds be paid?

* JONES, *for the plaintiff.* The rent ceaſes immediately upon her marriage, and he ſhall have remedy for the one hundred pounds in the ſpiritual court. If the words had been, "he ſhall "pay her a hundred pounds, and from that time the rent ſhall "ceaſe," it had been otherwiſe; if ſhe had died preſently after the marriage, her executor ſhould have had the hundred pounds.

* [273]

S. C. 2. Saund. 197. S. C. 2. Keb. 712. S.C. 1. Danv. 651. 1. Roll. Abr. 311. 347. Cro. Jac. 442. 1. Vern. 396. 2. Saund. 111. 8. Mod. 26. 10. Mod. 154. 189. 222. 371. 1. Stra. 229. Dougl. 63. 689. 1. Term Rep. 389.

BREWER and SAUNDERS, *for the defendant.*[1] She had not a preſent intereſt in the hundred pounds. In this very caſe the common pleas delivered their opinions, that this hundred pounds ought to be paid before the rent ſhould ceaſe; but for imperfection in the pleading we could not have judgment there. And by *Rolle's Abridgment* ſhe has no preſent intereſt in the hundred pounds, nor can her executors have any, and the rent ſhall not ceaſe till the payment of it. For, FIRST, It is deviſed to her for *life*, not during her *widowhood*. SECONDLY, The rent iſſues out of the inheritance, and by the conſtruction of the will it ſhall go to the executor; for by "ceaſe" in the will is meant "ceaſe "as to the wife;" and the executor is in nature of *purchaſor*, and ought to pay the money before he has the rent, and he ought to pay it out of his own eſtate if he will have the rent; for otherwiſe, if it be looked upon as a legacy, if he have no aſſets, ſhe ſhall be immediately ſtripped of her rent, and have nothing.

TWISDEN, *Juſtice.* I think the deviſor's meaning was to give her a preſent intereſt in the hundred pounds; and if ſo, the rent muſt ceaſe preſently upon the marriage. But ſince it is to be iſſuing out of the inheritance, it is doubtful: and ſince my brothers are both of opinion for the *avowant*, let him have judgment.

A huſband may avow *alone* for a rent-charge deviſed to his wife.

THEN it was objected, That *the avowry* was ill; for it ought to have been in the wife's name as well as the huſband's: and it was alledged, that *Rolle* in his Abridgment makes a *quære*, and ſeems to

1. Danv. Abr. 651. S. C. 2. Saund. 197. 1. Roll. Abr. 311. 347. 5. Mod. 73. 1. Vern. 396. Ld. Ray. 64. Dougl. 329.

be

be of opinion that the caſe of *Wiſe v. Bellent (a)*, which is to the contrary, is not law.

OSBORNE *againſt* WALLEZDEN

TWISDEN, *Juſtice.* That was his opinion, it may be, when he was a ſtudent. You have in that work of his a common-place which you ſtand too much upon: I value him where he reports judgments and reſolutions; but otherwiſe it is nothing but a collection of Year-Books, and little things noted when he made his common-place book. His private opinion muſt not warrant or controul us here. It has been adjudged, that the huſband alone may avow in right of his wife.

(*a*) Cro. Jac. 442. 1. Roll. Abr. 318.

* Donavan *againſt* Maſchall.

Caſe 26.

Trinity Term, 22. Car. 2. Roll 834.

DEBT UPON A BOND; the condition whereof was, That if *J. S.* and *J. D.* arbitrators, did make an award on or before the 19th day of *February*, and if the defendant ſhould perform it, then the obligation ſhould be void; and then follow theſe words, "and if they do not make an award *before* the nineteenth day of "*February*, then I impower them to chooſe an umpire, and by "theſe preſents bind myſelf to perform his award." The defendant pleads, that they did not make an award. The plaintiff replies, and ſets forth an award made upon the ſaid nineteenth day of *February* by an umpire choſen by the arbitrators, and alledges a breach thereof. The defendant demurs.

On a ſubmiſſion to arbitration, on condition, that if the arbitrator do not make an award on or before the 19th *Feb.* he may chuſe an umpire; the arbitrator may chuſe an umpire before that day; but an award made by the umpire on that day is void, unleſs it appear that the arbitrator had made no award.
S. C. 2. Keb. 714.
S. C. 1. Lev. 302.
S. C. Ray. 205.
Ante, 15.
1. Sid. 314. 456.
2. Jones, 167.
Lutw. 541.
1. Saund. 129. 133.
2. Saund. 130. 132.
1. Salk. 70.
2. Mod. 169.

SAUNDERS, *for the defendant.* FIRST, Here is no breach of the condition of the bond; for that which relates to the performing the umpire's award, it following thoſe words, "then the ob-"ligation ſhall be void," is no part of the condition; and if any action is to be brought upon that part, it ought to be *covenant.* SECONDLY, The award made by the umpire is void, becauſe made on the nineteenth day of *February*, which was within the time limited to the arbitrators for their power; and the umpire could not make an award within that time, becauſe their power was not then determined, as was lately adjudged in the caſe of *Copping v. Hornar (a).*

JONES, *for the plaintiff.* The condition is good as to this part; it is all but one condition. A man may make ſeveral defeaſances or conditions to defeat the ſame obligation. There is a continuance of this condition: it is ſaid, "I bind myſelf by theſe pre-"ſents;" which refers to the *lien* before in the obligation. I agree with the determination in the caſes of *Copping v. Hornar*, and *Bernard v. King (b)*, that where an umpire is at firſt certainly named and appointed, he cannot exerciſe his authority

(*a*) 1. Lev. 285. 1. Sid. 428. 454. Ray. 187. 2. Keb. 462. 679. 2. Saund. 132.
(*b*) 1. Danv. Abr. 541. p. 6. Stiles, 306.

DONAVAN *againſt* MASCHALL.

within the time appointed to the arbitrators, becauſe the ſame authority cannot be given to and continue both in *the arbitrators* and *the umpire* at the ſame time. But when the umpire is named and choſen by the arbitrators, as in our caſe, he may make his award within the time allowed to the arbitrators; * becauſe there the arbitrators by their own act, *viz.* the election of the umpire, determine their authority; and the authority veſts and remains in the umpire only: and ſo it was admitted in the caſe of *Bernard v. King (a)*.

* [275]

TWISDEN, *Juſtice* (*aſſentientibus* RAINSFORD and MORTON). This is a good part of the condition. There was a condition, that "if the obligor ſhould, &c. then the bond ſhould be void;" and further, that "the obligor ſhould releaſe:" and it was adjudged here, that the laſt was a part of the condition. I was at the bar when the caſe of *Bernard v. King* was ſpoken to, and I know ROLLE did hold and deliver then, That if it had been alledged, that the arbitrators had wholly denied and deſerted their power, it had let in the umpire, ſo as that he might account within the time allowed to the arbitrators; and he ſtood upon this then, that it was implicitly alledged, VIZ. *poſtquam denegaſſent, &c.* But this was a hard opinion of his, and he himſelf reports his own judgment otherwiſe *(b)*, and it may be that he altered his opinion.

We incline that the award in the caſe at the bar is naught; for the authority of the arbitrators was not determined till after the nineteenth day of *February*. In the caſe of *Jennings v. Vandeput (c)*, CROKE, *Juſtice*, goes ſo far as to agree, that arbitrators may nominate an umpire within the time for their making their award; ſo that the chuſing the umpire doth not extinguiſh their authority, and therefore the umpire could not make an award upon this nineteenth day of *February*. It is true, the arbitrators might chuſe him upon that day, or before; but yet ſtill they might have made an award, and therefore he could not.—*Adjournatur (d)*.

Sed note the difference in Nelſon's Lutw. 167, &c. ib.

(*a*) 1. Danv. 541. Styles, 306.
(*b*) 1. Roll. Rep. 262.
(*c*) Cro. Car. 263.
(*d*) The Court gave judgment for the *defendant*, becauſe it was not alledged by the plaintiff, that the arbitrators had not made an award. S. C. 2. Keb. 714.; for they agreed that the addition was parcel of the condition, and that the arbitrators may chuſe an umpire at any time during a continuance of this power; S. C. Ray. 206; S. P. 1. Term Rep. 645.; but that their power was not thereby determined; S. C. 1. Lev. 302. P. 2. Term Rep. 645. But the law of this caſe, and of all thoſe in which it has been held that the umpire cannot make an award until the arbitrators time is expired, 1. Sid. 428. 454. Ray. 187. 2. Saund. 129. ſeems to have been denied in Chace v. Dare, T. Jones, 168. in which it is held, that an award by the umpire, though made before the arbitrators time is expired, ſhall be good, if the arbitrators make no award within the time allowed them by the ſubmiſſion. See a Treatiſe on the Law of Awards, by Mr. Kyd, p. 47. to 56.

The

* The King *againſt* the Biſhop of Worceſter, Jervaſon, and Hinkley. Caſe 27.

Trinity Term, 21. Car. 2. Roll 1714.

[THE KING COUNTS, That *Queen Elizabeth* was ſeiſed of the advowſon of the church of *Norfield*, with the chapel of *Coſton* in groſs, in fee, *in jure coronæ*, and preſented one *James White* her clerk, who was admitted, inſtituted, and inducted: that from the ſaid queen the advowſon of the ſaid church, with the ſaid chapel, deſcended to *King James*, and from him to *King Charles the Firſt*, and from him to *His Majeſty* that now is; who being ſeiſed thereof, the ſaid church, with the chapel, became void by the death of the ſaid *James White*, and therefore it belongs of right to him to preſent: and that the defendants diſturbed him, to his damage of two hundred pounds; which the ſaid attorney is ready to verify for THE KING.

In *quare impedit*, if the king *ſuggeſts* a title, and the defendant *makes* a title, and traverſes the king's title, the king in his replication muſt maintain his own title ſuggeſted in the declaration; for it is not ſufficient for him to traverſe and deſtroy the title made by the defendant.

S. C. 2. Jones, 8. S. C. 1. Freem. 7. S. C. Vaugh. 53. Ante, 253. 8. Mod. 6. 105. 10. Mod. 123. 200. 245. 1. Stra. 266. 1. Ld. Ray. 211. 2. Ld. Ray. 1288. 3. Peer. Wms. 314. 4. Term Rep. 423.

The defendants plead ſeverally.—And firſt *The Biſhop* ſays, That he claims nothing in the ſaid church, and the advowſon, but as ordinary.—The defendant *Jervaſon* ſaith, That long before the ſaid preſentation ſuppoſed to be made by the late queen, one *Richard Jervaſon, eſq.* was ſeiſed of the manor of *Norfield*, with the appurtenances, *in com. prædicto*, to which the advowſon *eccleſiæ prædictæ tunc pertinuit, et adhuc pertinet*, in his demeſne as of fee; and, ſo ſeiſed, the ſaid church became void by the death of one *Henry Squire*, then laſt incumbent of the ſaid church, and ſo continued for two years, whereby the ſaid late queen, *prætextu lapſûs temporis*, in default of the patron, ordinary, and metropolitan, *eccleſiæ prædictæ pro tempore exiſtentis dictæ nuper reginæ devolutæ* by her prerogative; and afterward, that is, *tertio die Decembris*, 28. *Eliz.* by her letters patents under the great-ſeal, bearing date the ſaid year and day at *Weſtminſter*, to the ſaid church, then being void, preſented the ſaid *James White*, who was admitted, inſtituted, and inducted, *tempore pacis*, &c.: That the ſaid *James White* being ſo rector of the ſaid church, and the ſaid *Richard Jervaſon* ſeiſed of the ſaid manor to which the ſaid advowſon pertained, &c. the ſaid *Richard* after, at *Norfield* aforeſaid, died ſo ſeiſed; after whoſe death, the ſame deſcended to one *Thomas Jervaſon, eſq.* as ſon and heir of *Richard*, and from him deſcended to one *Sir Thomas Jervaſon, knt.* who entered, and was ſeiſed: and, ſo ſeiſed, the ſaid *Sir Thomas Jervaſon, March* 30th, 14. *Car.* 1. by his deed in writing, ſealed at *Norfield* aforeſaid, granted to one *Phineas White* the advowſon of the ſaid church, for the firſt and next avoidance only, whereby the ſaid *Phineas* was poſſeſſed for the next avoidance of the ſaid advowſon; and, ſo poſſeſſed, the ſaid church became void by the death of the ſaid *James White*, which was the firſt and next avoidance after the ſaid grant to *Phineas*: That *Phineas*, by virtue of his ſaid grant, preſented one *Timothy White* his clerk, who was thereupon admitted, inſtituted, and inducted, *tempore pacis tempore Car.* 1.: That the ſaid *Timothy* being rector, and the ſaid *Sir Thomas Jervaſon* ſeiſed as aforeſaid, the ſaid *Sir Thomas* died ſeiſed at *Nor-*

THE KING *against* THE BISHOP OF WORCESTER, JEVASON, AND HINKLEY.

field aforeſaid, and the ſaid manor, with the appurtenances, deſcended to *Thomas* the defendant, as his ſon and heir; who entered, and was, and yet is ſeiſed; and being ſo ſeiſed, the ſaid church became void by the death of the ſaid *Timothy White*, and the ſaid *Thomas Jervaſon*, the defendant, preſented the other defendant, *John Hinkley*, who was admitted, inſtituted, and inducted, long before the writ purchaſed.—The defendant then traverſes, ABSQUE HOC that the late queen was ſeiſed of the ſaid advowſon, with the chapel of *Coſton* aforeſaid in groſs, and as of fee, *jure coronæ ſuæ*; *et hoc paratus eſt verificare*; and demands judgment *ſi actio.*—JOHN HINKLEY, *the incumbent*, taking by *proteſtation* that the late queen was not ſeiſed, nor preſented, as by the declaration is ſuppoſed; FOR PLEA SAITH, That *Richard Jervaſon* was ſeiſed of the manor of *Norfield*, with the appurtenances, *in com. prædicto*, and the advowſon of the ſaid church appertaining thereto; and pleads the ſame plea *verbatim*, as to the queen's preſentation of *White* and all other things, as *Jervaſon* the plaintiff pleaded, and the preſentation of himſelf; and that he was, by the preſentation of the other defendant *Jervaſon*, admitted, inſtituted, and inducted into the ſaid church, *Sept.* 15, 1660; and traverſeth, ABSQUE HOC that the king was ſeiſed of the ſaid advowſon and chapel in groſs, as of fee; *et hoc paratus eſt verificare*; and demands judgment.

THE ATTORNEY GENERAL replies: and as to the biſhop claiming nothing but as ordinary, demands judgment, and a writ to the ſaid biſhop; and hath it with a *ceſſet executio*, until the plea determined between the king and the other defendants. And as to the plea of the ſaid *Thomas Jervaſon* the patron, THE ATTORNEY maintains the ſeiſin of the late *Queen*, and of *King James*, *King Charles the Firſt*, and of the *King* that now is, of the ſaid advowſon of the ſaid church and chapel, as by the count before is declared; and that the ſaid *Phineas White*, of his own wrong, by uſurpation upon the late *King Charles the Firſt*, to the ſaid church, then void by the death of the ſaid *James White*, preſented the ſaid *Timothy White*; and traverſeth, ABSQUE HOC that the advowſon of the ſaid church was, or is, pertaining to the manor of *Norfield*; and demands judgment, and a writ to the biſhop. And as to the plea of the *incumbent*, THE ATTORNEY replies as before to the patron's plea, That the late *Queen*, *King James*, *King Charles the Firſt*, and the *King* that now is, were ſeiſed of the ſaid advowſon in groſs, as of fee; and that the ſaid *Phineas White* preſented the ſaid *Timothy*, by uſurpation upon *King Charles the Firſt*; and traverſeth the appendancy of the advowſon *eccleſiæ prediſtæ* to the manor of *Norfield*.

THE PATRON *Jervaſon* rejoins, and demurs upon MR. ATTORNEY's replication, as inſufficient; and aſſigns for cauſe, That the attorney hath traverſed matter not traverſable, and that the traverſe ought to have been omitted out of the replication; as alſo, that the ſaid plea is repugnant in itſelf, and wants form. And *John Hinkley* the incumbent rejoins, That the ſaid advowſon is pertaining to the ſaid manor, as he alledged in his plea before: *et de hoc ponit ſe ſuper patriam*; and the attorney *ſimiliter*.

VAUGHAN,

VAUGHAN, *Chief Juſtice*.—FIRST, Upon this *quare impedit* brought, there is a good title to preſent ſurmiſed for the king, but no more; and there is much difference between a title *appearing* for the king and *ſuppoſed* only.—SECONDLY, The defendant, by his plea in bar, hath not well traverſed the king's title; for it is traverſed but in part; for only the ſeiſin of the advowſon in the queen is traverſed, whereas properly the ſeiſin and preſentation of the queen, by reaſon of her ſeiſin, ought to have been traverſed by *abſque hoc* that the queen was ſeiſed of the advowſon in groſs, and preſented.—THIRDLY, The ſeiſin of the advowſon, which makes not a title alone, nor is either traverſable or inquirable by the tender of a *demy mark* in the king's caſe in *droit d'advowſon*, is not traverſable neither alone in a *quare impedit*; but no demurrer being thereupon, nor any iſſue taken upon that traverſe, no more ſhall be ſaid of it.—FOURTHLY, The king may alledge ſeiſin, without alledging any time (as *Sir Edward Coke* ſaith) in a *droit d'advowſon*.—FIFTHLY, The defendant's traverſe was not neceſſary, becauſe he had confeſſed and avoided the queen's preſentation by ſaying it was by lapſe, if the defendant had reſted upon avoiding the queen's preſentation:—SIXTHLY, The attorney-general ought to have maintained his count, and traverſed the queen's preſentation by lapſe.—SEVENTHLY, He doth not do ſo, but deſerts making the king's title appear, and falls upon the plaintiff's title, that the advowſon was not appendant.—EIGHTHLY, He offers *a double iſſue*, that the preſentation of *Phineas White* was by uſurpation, and the advowſon not appendant to the manor.

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Imperfections in the pleading.

Fitz. N. Br. f. 31. letter D. Littl. Coke, 294. b.

26. *Hen.* 8. fo. 4. a. Hob. Digby and Fitzherb. f. 102. and Moore and Newman's Caſe, fo. 80. and 103. Rice and Harriſon's Caſe, Yelverton, f. 211.

FIRST, If a man count or declare in a *quare impedit*, That he or his anceſtors, or ſuch from whom he claims, were ſeiſed of the advowſon of the church, but declares of no preſentation made by him or them, ſuch count or declaration is not good; and the defendant may demur upon it: ſo is *Fitzherbert* expreſsly (*a*). "A "man" ſays he, "ſhall not have a *quare impedit*, if he cannot al- "ledge a preſentation in himſelf, or in his anceſtor, or in another "perſon through whom he claims the advowſon, and that in his "count, unleſs it be in ſpecial caſes:" and then he puts that ſpecial caſe; "as if a man at this day, by the king's licence, make a pa- "rochial church, or other chantry, which ſhall be preſentable, &c. "if he be diſturbed to preſent to it, he ſhall have a *quare impedit*, "without alledging any preſentment in any perſon, and ſhall count "upon the ſpecial matter." And the law in this, is the ſame in the caſe of *the king* with *a common perſon*, by all the Books, and precedents in the Books of Entry. To this add the *Lord Hobart's* judgment (*b*), which is always accurate for the true reaſon of the law. "Know that, though it be true that a preſentation may make a "fee without more," as a preſentation by uſurpation doth, "you "never have a declaration in a *quare impedit*, that the plaintiff "did preſent the laſt incumbent without more, but you declare "that the plaintiff was ſeiſed in fee, and preſented; or elſe lay the "fee-ſimple in ſome other, and then bring down the advowſon to "the plaintiff, either in fee, or ſome other eſtate. The reaſon is, "that the preſentment alone is militant and indifferent, and may

(*a*) Fitzh. Nat. Br. f. 33. letter H.

(*b*) In the caſe of G. Digby v. Martha Fitzherbert, Hob. Rep. 101, 102.

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"be in ſuch a title as may prove that this new avoidance is the "defendant's; and therefore you muſt lay the caſe ſo, that by the "title you make the preſentation paſt, joined to your title, to prove "that this preſentation is likewiſe yours, as well as the laſt." Whence it follows, that a count of an eſtate and ſeiſin without a preſentation, or of a preſentation without an eſtate, are equally vicious and naught, be it in the caſe of *the king* or of *a common perſon*, and was never in example or precedent.

Hobart, f. 162. Colt and Glover's Caſe, *ad finem paginæ.*

SECONDLY, A ſecond neceſſary premiſe is this, and is both natural and manifeſt: When you will recover any thing from me, it is not enough for you to deſtroy my title, but you muſt prove your own better than mine: for it is not rational to conclude, that you have no right to this, and therefore I have; for without a better right, *melior eſt conditio poſſidentis* is regular.

THIRDLY, "Every defendant," ſays *Hobart*, "may plead in a "*quare impedit* the general iſſue, which is '*ne diſturba pas*,' be"cauſe that plea doth but defend the wrong wherewith he ſtands "charged, and leaves the plaintiff's title not only uncontroverted, "but in effect confeſſed; and the plaintiff may, upon that plea, "preſently pray a writ to the biſhop, or, at his choice, maintain "the diſturbance for damages." But if a man will leave the general iſſue, and controvert the plaintiff's title, he muſt then enable himſelf, by ſome title of his own, to do it. But yet that is not the principal part of his plea, but a formal inducement only; and therefore there is no ſenſe, if you will quarrel with my poſſeſſion, and I, to avoid your title effectually, do induce that with a title of my own, that you ſhall fly upon my title, and forſake your own; for you muſt recover by your own ſtrength, and not by my weakneſs. The *Lord Hobart* goes further, in giving the reaſon of this courſe of pleading, in *Colt v. Glover*, in the place before cited (*a*): "Of this "form of pleading in law, there is one reaſon common to other actions, "wherein title is contained to the land in queſtion, *ſpecially*; which "is, that the tenant ſhall never be received to counter-plead, but "he muſt make to himſelf, by his plea, a title to the land, and ſo "avoid the plaintiff's title alledged by traverſe, or confeſſing and "avoiding. But in the *quare impedit* there is a further reaſon of it, "for therein both plaintiff and defendant are actors one againſt "another; and therefore the defendant may have a writ to the bi"ſhop as well as the plaintiff, which he cannot have without a title "appearing to the Court;" and ſo are the precedents, when a *quare impedit* is brought againſt the patron for diſturbance of his clerk, not being in poſſeſſion.

(*a*) Hob. 162, 163.

Raſtal Ent. 1. 484. a. b.

The caſe in brief, and the queſtion upon it.

Upon the record, as it hath been opened, and the pleading therein between the king and the patron, upon which all the queſtion ariſeth, I ſhall not make the queſtion to be, Whether there may be *a traverſe* taken upon *a traverſe* (though that queſtion be in truth in the caſe); for that is a queſtion rather upon *terms of art*, than a *quæſtio forenſis*, and riſing upon the naked facts of a caſe depending in judgment. I ſhall therefore make the queſtion upon this caſe ſuch as nakedly it is, without involving it in any difficulty of terms. The king brings a *quare impedit*, and declares, That

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Queen Elizabeth was seised of the advowson of the church of *Norfield* in gross, as of fee, and presented, and derives the advowson to himself; and that the church became void by the death of the queen's presentee, and he is disturbed to present by the defendant *Jervason*. The defendant saith, That before the queen presented, *R. Jervason* his ancestor was seised in fee of the manor of *Norfield*, to which the advowson of this church is appendant: that it became void by the death of one *Squire*, and continued so for two years, and that the queen then presented *White* her clerk by lapse: that the manor and advowson descended from *Richard* to *Thomas Jervason*, from *Thomas* to *Sir Thomas Jervason*, who granted the next avoidance to *Phineas White*; who presented, upon the death of *James White*, one *Timothy White*, who was instituted and inducted, and then derives the manor and advowson to himself; and that the church becoming void upon the death of the said *Timothy*, he presented the other defendant *Hinkley*, and traverseth the queen's seisin of the advowson in gross.

The law in case of a common person.

If a common person bring a *quare impedit*, and count his title to present, and that he is disturbed; the defendant, to counterplead the plaintiff's title, makes (as he must) a title to himself to present, and confesses and avoids, or traverses the plaintiff's title. FIRST, The plaintiff shall never desert his own title, and by falling upon, and controverting the weakness only of the defendant's title, recover or obtain a writ to the bishop, though the defendant's title do not appear to the Court to be sufficient, for the unanswerable reasons given by the *Lord Hobart* in the first place.—SECONDLY, If you will recover any thing from another man, it is not enough for you to destroy his title, but you must prove your own better than his.—THIRDLY, There is no sense, if you will quarrel with my possession or right, and I, to avoid your title effectually, either by traversing it, which is denying, or by confessing and avoiding it, do induce that with a title of mine own, that you shall fly upon my title to impeach it, and forsake your own, as I said before.—FOURTHLY, Though I should, being plaintiff, make it appear to the Court, that the defendant's title is not good, but no way make it appear that my own title is good, what inducement can the Court have to judge for me and against the defendant, when no more right appears for the one than the other; and not only so, but no right appears for either? In such case sure, *melior est conditio possidentis*: I ought not to be sued by him I have not wronged; and he who hath no right, can suffer no wrong.—FIFTHLY, It is to no end that the plaintiff should set forth any title at all, if he be not to make it good; for it would serve his turn only to impeach the defendant's title, and conclude thus unreasonably, that if I can make it appear the defendant hath not a good title, therefore I have and must have judgment for me. And where the king's title, in a *quare impedit* brought by him, appears to be no more than a bare suggestion, the king cannot any more than a common person (and for the same reasons) forsake his own title, and endeavour only the destroying of the defendant's title; for the weakening of the defendant's title without more, can no more make a good title to

How far in the king's case the law differs not from the case of a common person.

the

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the king, than it can to a common perſon. If the king, or his predeceſſor, hath preſented by reaſon of wardſhip, of lapſe, of the temporalties of a biſhop in his hands, of outlawry, and in many other caſes, when the church becomes void next after the ward's age and ſuing his livery, after the death of him preſented by lapſe, reſtitution of the temporalties, and reverſal of the outlawry; in all theſe caſes, if the king bring a *quare impedit*, and count that he was ſeiſed of the advowſon in groſs, and preſented, and the true patron ſhall confeſs his preſentation, and avoid it by ſhewing in theſe ſeveral caſes that his preſentation was in right of the ward, by lapſe, by reaſon of outlawry, or of temporalties being in his hands, the king ſhall deſert his own title, and controvert the defendant's reſpective titles in whoſe right he did formerly preſent, and if their title happen to appear not good, recover the ſecond preſentation, againſt thoſe manifeſt rules of law delivered. If this ſhould be law generally, then, though the king have no title to preſent, nor pretend to any (for it differs not, not to pretend at all, and not to be obliged to make good the title pretended) it were a more compendious way, when any patron preſented, that the king ſhould, by *ſcire facias*, compel him to ſet forth his title, and *demur* upon it, or *traverſe* it, and recover the preſentation, if the patron's title were any way defective. But it muſt be agreed there are caſes in which the king may deſert his own title, and not join iſſue upon the defendant's traverſing the king's title, or avoiding it, but traverſe the title made by the defendant in his bar, which is directly taking a traverſe upon a traverſe; which regularly *a common perſon* cannot do; nor I think in any caſe, but where the firſt traverſe tendered by the defendant is not material to the action brought, as in the caſe of waſte in the *Long Quinto* (*a*), the caſe of *Digby v. Fitzherbert* (*b*), and the caſe of *Woodroffe v. Cotford* (*c*). The king, counting of a title to himſelf by *office found*, or by other *matter of record*, which is another thing than only *ſurmiſing* a title, as in the caſe at bar, may chuſe to maintain his own title found by office, and traverſed by the defendant, or otherwiſe appearing of record, and take a traverſe to the title made by the defendant. The reaſon is manifeſt; for the office of itſelf is a title appearing for the king, and he ſhall never loſe his poſſeſſion, having a title, but where the defendant's title doth appear a better. But what is this, that the king ſhould relinquiſh his own title only ſurmiſed, and controvert the defendant's, whoſe title, though it ſhould appear naught, leaves no title in the king, but that when an office is found, or a title for the king appears by other matter of *record*, if the defendant have no title, the king hath one by his office, or other record. Some books, *primâ facie*, ſeem to make for the opinion, that the king may generally deſert his own title, and take a traverſe to the defendant's. *Brook, tit. Prerogative, pl.* 65. "Where a man traverſeth the office of the king, "and makes to himſelf a title (*ut oportet*), traverſing the title of the "king contained in the office, the king may chuſe to maintain his own "title, or to traverſe the title alledged; for the king is not bound to "ſtand

In what the law differs in the king's caſe from the caſe of a common perſon.

(*a*) 5. *Edw.* 4. in waſte for cutting ſo many trees, and ſelling them, f. 100. b.

(*b*) Hob. 160.

(*c*) Hob. 105.

13. *Edw.* 4. f. 8. a.

3. *Hen.* 7. f. 3. Stamford, "Prærogative," f. 64. b.

So is 13. *Ed.* 4. f. 8. and many other books.

Br. "Preroga-"tive," pl. 65. 7. *Edw.* 6.

" ſtand to the firſt traverſe which tenders an iſſue, but may traverſe " the matter of the plea of his adverſary." For this no ancient book is cited. But *dicitur Hilar.* 7. *Edw.* 6. *quòd ſic utitur* in an information put by the ſubject for the king in the exchequer, " that where the " defendant pleads a bar, and traverſeth the information, the king may " traverſe the matter of the bar, if he will, and is not bound to main- " tain the matter contained in the *abſque hoc*." This caſe, as appears in the firſt part of it, was in the caſe of *an office*, and therefore makes not at all againſt my diverſity: in the latter part the aſſertion ſeems more general, as if the king could in any caſe deſert to maintain the matter of his information, and traverſe the bar of the defendant; but there is nothing in this part of the caſe poſitive enough to over-rule my difference, and is no more but " *ſic utitur ut* " *dicitur in ſcaccario*," which may be a miſtaken report. The other caſe is likewiſe in *Brook*, but no ancient book-caſe cited, but only 38. *Hen.* 8. and no more. " An information in the *Chequer:* The " defendant pleads, and traverſeth a material point in the information, " whereupon they are at iſſue; there the king cannot waive this " iſſue, as he may in other caſes, where the king alone is party, " without an informer, *ut ſupra per attornatum regis, et alios le-* " *gis peritos*." This caſe ſeems likewiſe to conclude, That when the information is only for the king, and a material point traverſed, upon which iſſue is joined, that the king is not bound to that iſſue, but may take another. This diſaffirms the former caſe, that when the information is by an informer, the king muſt maintain his information. Note the cloſe of this caſe, " *ut ſupra per attor-* " *natum regis, et alios legis peritos*." I ſhall give the caſe here mentioned in this *ut ſupra*, which will, I think, determine the queſtion, and clearly eſtabliſh the law according to the difference taken. That caſe is likewiſe in *Brook*, and cited to be as in 34. *Hen.* 8. whereof there is no Year-Book, neither ſome four years before the laſt caſe I mentioned. It is thus: " *Nota* by WHOREWOOD *attornatum* " *regis, et alios*, when an information is put into the *Chequer* upon " a penal ſtatute, and the defendant makes a bar, and traverſeth, " there the king cannot waive ſuch iſſue tendered, and traverſe the " former matter of the plea, as he can upon traverſe of an office, and " the like, when the king is ſole party, and entitled by matter of record; " for upon the information there is no office found before, and alſo a " ſubject is party with the king for a moiety, *quod nota bene*." Here it is moſt apparent, that upon an information, when the king hath no title by matter of record, as he hath upon *office found*, the king cannot waive the iſſue tendered upon the firſt traverſe, though the information be in his own name; which diſaffirms the ſecond caſe in that point: and for the ſupernumerary reaſon, that the king is not the ſole party in the information, it is but frivolous, and without weight; but the ſtreſs is, where the king is ſole party, and entitled by matter of record. I ſhall add another authority out of *Stamford's Prerogative*. " If the king be once ſeiſed, his highneſs " ſhall retain againſt all others who have not title, notwithſtanding it " be found alſo that the king had no title, but that the other had poſ- " ſeſſion before him, as appeareth in 37. *Aſſ. p.* 35. which is *pl.* 11. " where it was found, That neither the king nor the party had title, " and

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7. Edw. 6.

Br. " Travers " pur ſans ceò," p. 369. 38. *Hen.* 8.

Br. " Preroga- " tive," p. 116. 34. *Hen.* 8.

37. Aſſ. pl. 11.

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"and yet adjudged that the king ſhould retain; for the office that "finds the king to have a right or title to enter, makes ever the "king a good title, though the office be falſe, &c. and therefore no "man ſhall traverſe the office, unleſs he make himſelf a title; and "if he cannot prove his title to be true, although he be able to prove "his traverſe to be true, yet this traverſe will not ſerve him. It is "to be noted, that the king hath a prerogative which a common "perſon hath not; for his highneſs may chuſe whether he will "maintain the office, or traverſe the title of the party, and ſo take "traverſe upon traverſe. If the king take iſſue upon a traverſe to "an office, he cannot in another term change his iſſue, by traverſing "the defendant's title, for then he might do it infinitely. But the "king may take iſſue, and after demur; or firſt demur, and after "take iſſue; or he may vary his declaration: for in theſe caſes, as to "*the right*, all things remain, and are as they were at firſt; but "this ought to be done in the ſame term, otherwiſe the king "might change without limit, and tie the defendant to perpetual "attendance."]"

Stamford, Prærogative, f. 62. b.

Stamford, Prærogative, f. 64. b.

13. *Edw.* 4. expreſsly, and ſeveral other books.

28. *Hen.* 6. f. 2. a.

WYLDE, *Juſtice.* I think the king cannot take the traverſe in this caſe; and this will appear by looking into the old books, which were not well conſidered by thoſe who did reply. It is ſaid in the *Year Book* 13. *Hen.* 7. 13, 14. *pl.* 18. that the king may chuſe, either to maintain his own title, or to traverſe the title of the party who ſues him by petition: ſo in the 13. *Edw.* 4. 8. *pl.* 1. it is ſaid, that when one traverſes an office, the king may either maintain the office, or traverſe the title ſhewn for the party, becauſe no man ſhall recover lands againſt the king without having a title. But there it is reſolved, That if the king join iſſue upon his own title, he cannot change iſſue, and traverſe the title ſhewed for the party. Now here is the allegation of the king, that the advowſon was in groſs, and the defendants denying it, is in nature of joining an iſſue, which cannot be receded from. But the reaſon why in that caſe the king might waive the traverſe tendered to his title, and traverſe the title ſhewn for the party, is, becauſe the office puts the king in actual poſſeſſion; for where the king is in by *record*, or *poſſeſſion* (for poſſeſſion is enough), the party muſt make a title, if he will recover againſt the king, as in *Savage's Caſe (a)*. It was found by inquiſition, that whereas THE TURN, time out of mind, uſed to be held at *Worceſter*, he, being ſheriff for life, held it at *Pedyl* and *Streight*, *contra formam ſtatuti de* MAGNA CHARTA: upon a *ſcire facias* upon an information hereupon, for forfeiting the office, he pleads, That time out of mind, &c. it uſed to be held * at *Pedyl*, *&c.* ABSQUE HOC that it uſed to be held at *Worceſter:* Reſolved, that the king might maintain the inquiſition, that it uſed to be held at *Worceſter*, ABSQUE HOC that it uſed to be held at *Pedyl*, *&c.* and the reaſon is, becauſe the king was intitled to the forfeiture by a record. The difference is, Where the king is actor, as here he is, being out of poſſeſſion,

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(*a*) Keil. 192. pl. 3.

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he muſt make a title, and prove it. But where the party is actor, he cannot fix upon his own title, and force the king to make good his own title: 34. *Hen.* 8. *Br. Prerog.* 116. *Whorewood's Caſe* is full in point. In an information *tam quam*, if the defendant traverſe, the king cannot waive the iſſue ſo tendered. One reaſon indeed given is, becauſe the king is not ſole party; but the chief reaſon is, becauſe the king is not intitled by matter of record: for ſaith the book, There is no office found before the information; but upon a traverſe of an office, *et hujuſmodi*, ſaith the book, the king may do it, becauſe he is intitled by matter of record; therefore, in our caſe, the king ſhall not waive the iſſue tendered, &c. and fly upon the matter of the defendant's title.

ARCHER, *Juſtice, accordant*. It muſt be admitted, that in this caſe the king muſt make a title, becauſe by preſenting of *Tim. White* and alſo of *Hinkley* the defendant, the which was nine years ſince, he is put to his *quare impedit*, and is out of poſſeſſion, I do not ſay of the inheritance, though that hath been a queſtion in the old books (*a*). But it has been adjudged, that the inheritance cannot be gained or deveſted out of the king by any uſurpations (*b*); but that he may grant away the inheritance of the advowſons ſtill, &c. But it is as clear, and agreed by all thoſe books, and by *Boſwell's Caſe* (*c*), that in ſuch caſe, he muſt bring a *quare impedit* to recover the preſentation, for he is put out of poſſeſſion of that. For as LORD HOBART obſerves (*d*), it is one of the things whereupon uſurpation works more violently than upon other poſſeſſions. Now he that is thus out of poſſeſſion, and put to his *quare impedit*, muſt always make a title to himſelf in the declaration (*e*); and this the defendant cannot counterplead, but by conveying a title to himſelf, and ſo avoiding the plaintiff's alledged title, by traverſe, or confeſſing and avoiding (*f*). Now here the defendant hath done what he could do; he hath traverſed the king's title; why then * ſhall the king depart from his own title, and fly upon the defective title of the defendant? No; *Actori incumbit onus*; he muſt recover by his own ſtrength, not by the defendant's weakneſs. The defendant, by traverſing the king's title, has cloſed up the king, ſo as that he ought to take iſſue, and maintain his own title (*g*). I ſay therefore, that the king's declining his own title, and falling upon the other's, is a departure, which is matter of ſubſtance, and it would make pleading infinite: therefore the demurrer in this caſe is good. The caſe of *Chicheſley v. Thompſon* (*h*) is in point; and ſo is HOBART's opinion in *Digby v. Fitzherbert* (*i*); and though the Judges are two and two in that caſe, as it is there reported, yet the whole Court agreed it afterwards. So that were this a common perſon's caſe, I ſuppoſe it would be agreed on all hands. But it is inſiſted, that this is one of the king's prerogatives, That when his title is

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(*a*) See Cro. Jac. 53.
(*b*) Cro. Jac. 123. Cro. Eliz. 241. 519. 6. Co. 30. and ſee 7. Ann. c. 18. Ante, page 256. notis.
(*c*) 6. Co. 49, 50.
(*d*) Hob. 322.
(*e*) Hob. 102.
(*f*) Hob. 163.
(*g*) Cro. Jac. 651.
(*h*) Cro. Car. 105.
(*i*) Hob. 103.

traverſed

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traverſed by the party, he may either maintain his own title, againſt the traverſe of the party, or traverſe the affirmative of the party (*a*). I anſwer, It is true, this is reckoned up among many other prerogatives of the king. But, FIRST, with reverence, ſeveral of them are judged no law; as that if the king have title by lapſe, and he ſuffer another to preſent an incumbent, who dies, the king ſhall yet preſent, is counter-judged (*b*), and both that and the next following point too. SECONDLY, In the ſame caſe (*c*), there is a good rule given, which we may make uſe of in our caſe, *viz.* The common law doth ſo admeaſure the king's title and prerogatives, as that they ſhall not take away, nor prejudice any man's inheritance (*d*). Now my brother WYLDE hath given the true anſwer, That when the king's title appears to the Court upon record, that record ſo intitles the king, that by his prerogative he may either defend his own, or fall upon the other's title: for in all caſes where the king either by traverſe (*e*), or otherwiſe, as by ſpecial demurrer (*f*), falls upon a defendant's title, it muſt be underſtood, that the king is intitled by record; and ſometimes it is remembered, and mentioned in the caſe (*i*), that the king is in as by office, &c. But in *Brook* "*Prerog.*" 116. the king's attorney doth confeſs the law to * be ſo expreſsly, that the king has not this prerogative, but where he is entitled by matter of record. Before the 21. *Jac.* 1. c. 2. when the king's title was found by any inquiſition, or preſentment, by virtue of commiſſions to find out concealments, defective titles, &c. he exerciſed this prerogative of falling upon and traverſing the parties titles, and much to the prejudice of the ſubjects, whoſe titles are often ſo ancient and obſcure as they could not well be made out. Now that ſtatute was made to cure this defect, and took away the ſeverity of that prerogative; ordaining, That the king ſhould not ſue or impeach any perſon for his lands, &c. unleſs the king's titles had been duly in charge to that king or *Queen Elizabeth*, or had ſtood *inſuper* of record within thirty years before the beginning of that parliament, &c. *Hob.* 118, 9. The king takes iſſue upon the defendant's traverſe of his title; and could the king do otherwiſe, the miſchief would be very great, as my brother obſerved, both to the patron and incumbent. The law takes notice of this, and had a jealouſy that falſe titles would be ſet on foot for the king: and therefore the ſtatute 25. *Edw.* 3. ſt. 3. c. 7. and 13. *Rich.* 2. c. 1. and 4. *Hen.* 4. c. 22. enables the ordinary and incumbent to counterplead the king's title, and to defend, ſue, and recover againſt it. But *à fortiori* at common law the patron, who by his endowment had this inheritance, might controvert and traverſe the king's title; and it is unreaſonable and miſchievous, that the crown's poſſeſſions by lapſe, or, it may be, the mere ſuggeſting a title for the king, ſhould put the patron to ſhew and maintain his title, when per-

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(*a*) Paſch. Pr. C. 242. a.
(*b*) Cro. Car. 44. 7. Co. 28.
(*c*) 7. Co. 236.
(*d*) 19. Edw. 4. pl 9. 11. Hen. 4. pl. 37. 13. Edw. 4. pl. 8. 28. Hen. 6. pl. 2. 9. Hen. 4. pl. 6. F. N. B. 152.
(*e*) 24. Edw. 3. 30. pl. 27. Keil. 179. 192.
(*f*) Fitz. Abr. "Mon. de Fait," 172.
(*g*) Fitz. Abr. 34.

haps

haps his title is very long, conſiſting of twenty meſne conveyances, and the king may traverſe any one of them: *Keilway* 192. b. *pl.* 3. I conclude, I think the king ought to have taken iſſue, and he not doing it, the demurrer is good, and that the defendant ought to have judgment.

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TYRREL, *Juſtice, contra.* I am not ſatisfied but here is a *diſcontinuance*; for the defendant pleads the appendancy of the *church* only, not the *chapel*: it is true, he traverſeth, that the queen was not ſeiſed of both. I deny what is affirmed, that the king by his preſentation of *Timothy White*, and the preſent incumbent, is out of poſſeſſion. By judgment of reverſal the law at this day is (*a*), that he cannot be put out of poſſeſſion of an * advowſon by twenty uſurpations. A *quare impedit* is an action of poſſeſſion; and if he were out of poſſeſſion, how could he bring it? As to this traverſe, it is a common erudition, that a party ſhall not depart, and that there ſhall not be a traverſe upon a traverſe (*b*). But the king is excepted; and it is agreed, that where the king is in poſſeſſion, and where he is entitled by matter of record, he may take a traverſe upon a traverſe (*c*); and there is no book ſays, that where he is in by matter of fact, he cannot do it: indeed there is ſome kind of pregnancy at leaſt in the laſt of thoſe authorities (*d*); but I will cite two caſes on which I will rely; *viz.* 19. *Edw.* 3. *Fitz. Monſtr. de Faits*, 172. which is our caſe. The king in a *quare impedit* makes title by reaſon of a wardſhip, whereby he had the cuſtody of the manor to which the advowſon belonged, and that the father died ſeiſed thereof, &c.; and there is not a word that his title was by matter of record. The defendant pleads, that the father of the ward made a feoffment of the manor to him for life, and afterwards releaſed all his right, &c. ſo that the father had nothing therein at the time of his death; and that after his death, he, the defendant, enfeoffed two men, &c. and took back an eſtate to him for ten years, which term yet continues, and ſo it belongs to him to preſent. But he did not ſhew the releaſe, but demurred in judgment upon this, that he ought not to ſhew the releaſe; and the king departs from his count, and inſiſts upon that which the defendant had confeſſed, that he had made a feoffment; which he having not ſhewn by the releaſe, as he ought to make himſelf more than tenant for life, was a forfeiture, and therefore the heir had cauſe to enter, and the king in his right; and thereupon prays judgment, and has a writ to the biſhop (*e*). The other caſe is 24. *Edw.* 3. 30. *pl.* 27. which is our very caſe. The king brings a *quare impedit* for a church appendant to a manor as a guardian; the defendant makes a title, and traverſeth the title alledged by the king in his count, *viz.* the appendancy; the king replies and traverſes the defendant's title: for this cauſe the

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(*a*) Cro. Jac. 123.
(*b*) See 1. Lev. 192, 193. 2. Lev. 212. 275. 1. Saund. 21, 22, 23. 2. Ld. Ray. 201. 211.
(*c*) 5. Co. 104. Plowd. 243. Br. "Petition," 22. Br. "Prero." 56. 60. 69. 116.
(*d*) Br. "Prero." 116.
(*e*) 7. Co. 86. Co. Lit. 304.

defendant

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defendant demurs, and judgment was for the king. In this case it doth not appear in the pleading, that the king was in by matter of record, and so it is our very case: for the king may be in by possession by virtue of a wardship without matter of record by entry, &c (*a*). I rely * upon these two cases. But 7. *Hen.* 8. *Keilw.* 175. is somewhat to the purpose. By FITZHERBERT: In a ravishment of ward by the king, if the defendant make a title and traverse the king's title, the king's attorney may maintain the king's title, and traverse the defendant's title. I think there is no difference between the king's being in possession by matter of *record*, and by matter of *fact*. Again, if matter of record be necessary, here is enough, *viz.* the queen's presentation under THE GREAT SEAL of *England:* and here is a descent, which is and must be *jure coronæ*. It is unreasonable that a subject should turn the king out of possession by him that hath no title. This is a prerogative case. As to the statutes objected by my brother ARCHER, they concern not this case. The first enables the patron to counterplead; but here the patron pleads. The rest concern the king's presenting *en auter droit*; but here it is in his *own right*. I think the king in our case may fly upon the defendant's title, and there is no inconvenience in it: for the king's title is not a bare suggestion; for it is confessed by the defendant, that the queen did present, but he alledges it was by lapse. For another reason I think judgment ought to be for the king, *viz.* Because the defendant has committed the first fault: for his bar is naught, in that he has traversed the queen's seisin in gross; whereas he ought to have traversed the queen's presentment *modo et formâ*. For where the title is by seisin in gross, it is repugnant to admit the presentment, and deny the seisin in gross; because the presentment makes it a seisin in gross: the Year Book of 10. *Hen.* 7. 27. *pl.* 7. is in point, and so is my *Lord Buckhurst's Case* in 1. *Leon.* 154. The traverse here is a matter of substance: but if it be but form, it is all one; for the king is not within the statute of 27. *Eliz.* c. 5.—So he concluded that judgment ought to be given for the king (*b*).

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(*a*) Staunforde Prerogativa Regis, 54.

Vaugh. 56, 57. Yelv. 211. 2. Mod. 185. 2. Stra. 1012.

(*b*) But judgment was given for the defendant. See S. C. Vaugh. 53.

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Case 28.

* Doctor Lee's Case.

An *archdeacon* cannot be appointed by commissioners of sewers to the office of *expenditor*.

S. C. 1. Vent. 105. 1. Lev. 303. F. N. B. 175.

RAYMOND moved for *a writ of privilege* to be discharged from the office of *expenditor*, to which he was elected and appointed by the commissioners of sewers, in some part of *Kent*, in respect of some lands he had within the Level. He insisted that *Doctor Lee* was an ecclesiastical person, archdeacon of *Rochester*, where his constant attendance is required; adding, that the office to which he was appointed was but a mean office, being in the nature of that of a bailiff, to receive and pay some small sums of

2. Inst. 4. Co. Lit. 99. 6. Mod. 140. 1. Stra. 87. 698. 2. Stra. 1107.

money

money; and that the lands in reſpect whereof he is elected were let to a tenant. DOCTOR LEE'S CASE.

It was objected againſt this, That this archdeacon's predeceſſors executed this office.

THE COURT ordered notice to be given; and granted a rule to ſhew cauſe why the Doctor ſhould not execute this office.

Afterwards, RAINSFORD and MORTON, *Juſtices*, only being in court, it was ruled that he ſhould be privileged, becauſe he is a clergyman. But I think for another reaſon, *viz.* becauſe the land is in leaſe, and the tenant, if any, ought to do the office.—The *writ of privilege* was accordingly allowed.

Lucy Lutterell, Widow, *againſt* George Reynell, Eſq. George Turbervile, Eſq. John Cory and Anne Cory. Caſe 29.

THE PLAINTIFF, as adminiſtratrix to *Jane Lutterell* during the minority of *Alexander Lutterell*, the plaintiff's ſecond ſon, declared againſt the defendants in an action of *treſpaſs*, For that they, together with *John Chappell*, *&c.* did take away four thouſand pounds of the monies numbered of the ſaid *Jane*, upon the 20th day of *October* 1680; and ſo for ſeven days following the like ſums, *ad damnum* of thirty-two thouſand pounds. * Upon a full hearing of witneſſes on both ſides, the jury found two of the defendants guilty, and gave ſix thouſand pounds damages; and the others not guilty. A new trial was afterwards moved for, and denied. MR. ATTORNEY GENERAL at the trial excepted againſt the evidence, That if it were true, it deſtroyed the plaintiff's action, inaſmuch as it amounted to prove the defendants guilty of *felony*; and that the law will not ſuffer a man to ſmother a felony, and bring treſpaſs for that which is a kind of robbery. "Indeed, ſaid he, if they had been *acquitted* or *found* "*guilty* of the felony, the action would lie. Therefore it may be "maintained againſt *Mrs. Cory*, and againſt *William Maynard*, "who were acquitted upon an indictment of felony for this mat- "ter; but not againſt the reſt."—But THE LORD CHIEF BARON declared, and it was agreed, that it ſhould not lie in the mouth of the party to ſay that he himſelf was a thief, and therefore not guilty of the treſpaſs: but perhaps if it had appeared upon the declaration, the defendant ought to have been diſcharged of the treſpaſs. *Sed quære*, What the law would be, if it appeared upon the pleading, or were found by ſpecial verdict?

Treſpaſs will not lie for taking money, if it appear, either on the *evidence*, or in the *pleadings*, on the part of the *plaintiff* to be *felony*; except the party has been proſecuted for the crime; but the *defendant* cannot ſhew the *felony* in bar of the *treſpaſs*.

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2. Roll. Abr. 557. Jones, 148. Latch. 145. 12. Mod. 339. 2. Ld. Ray. 981.

MY LORD CHIEF BARON alſo declared that it was agreed, That whereas *William Maynard*, one of the witneſſes for the plaintiff, was guilty, as appeared by his own evidence, together with the defendants, but was left out of the declaration, that he might be a witneſs for the plaintiff, that he was a *good and legal* witneſs; but his *credit* was leſſened by it, for that he ſwore in his own diſ-

In *treſpaſs*, if the fact appear on trial to have been *felony*, a perſon, though proved by his own teſtimony to be a *particeps criminis*, is a *competent* witneſs

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charge; for that when theſe defendants ſhould be convicted, and have ſatisfied the condemnation, he might plead the ſame in bar of an action brought againſt himſelf. But thoſe in the *ſimul cum* were no witneſſes *(a)*.

(a) *A.* wins money of *B.* by means of *C.* and *D.* packing the cards; upon an indictment againſt *C.* and *D.* *A.* cannot be a witneſs, becauſe *intereſted* in the conviction; for it might give the record of it in evidence on a proſecution againſt him as a *particeps criminis*. By LEE, *Chief Juſtice*, at the ſittings after Mich. Term, 15. Geo. 2. in the caſe of Rex *v.* Backwell, Merrill, and Others. *Note to the Fourth Edition.*—See alſo 8. Mod. 60. 10. Mod. 193. 12. Mod. 72. 520. Stra. 633. 2. Ld. Ray. 1007. 1411. Caſes in Crown Law, 2d edit. 141. 365.

Hearſay, though not direct evidence, is admiſſible in corroboration of a witneſs's teſtimony.

Several witneſſes were received, and allowed, to prove, That *William Maynard* did at ſeveral times diſcourſe and declare the ſame things, and to the like purpoſe, that he teſtified now. And the LORD CHIEF BARON ſaid, though a *hearſay* was not to be allowed as a direct evidence, yet it might be made uſe of to this purpoſe, *viz.* to prove that *William Maynard* was conſtant to himſelf, whereby his teſtimony was corroborated.

Skin. 402. Holt, 286. Bull. N. P. 294. Gilb. Evid. 4th edit. 150.

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Depoſitions in chancery may be read in evidence on a trial at law, if the deponent is diſabled by *ſickneſs* to attend.

One THORNE, formerly *Mr. Reynell's* ſervant, being *ſubpœna'd* by the plaintiff to give evidence at this trial, did not appear. But it being ſworn by the *Exeter* waggoner, *that *Thorne* came ſo far on his journey hitherward as *Blandford*, and there fell ſo ſick that he was not able to travel any farther, his depoſitions in chancery, in a ſuit there between theſe parties about this matter, were admitted to be read.

10. Mod. 210. 225. 262. 12. Mod. 215. 231. 305. 319. 339. 375. 493. 607. Fitzg. 197. 1. Peer. Wms. 288. 414. 557. 2. Peer. Wms. 563. 1. Ld. Ray. 729. 2. Ld. Ray. 873. 1166. 1371. 1. Vern. 331. 413. Prec. Chan. 64. Abr. Eq. 227. 2. Stra. 920. The like point in Mr. Fitzgerald's Caſe, in chancery, Trinity Term, the 15. & 16. Geo. 2. where the witneſſes were gone abroad. And ſee Gilbert's Law of Evidence, 4th edit. 60.

Caſe 30.

Smith *againſt* Smith.

If one of two executors receive the whole of the teſtator's effects, and the other ſues for the recovery of his moiety, an *aſſumpſit*, on a promiſe to pay him ſo much, in conſideration he will *forbear*, and ſhew him *an account*, is good after verdict, although it is not ſtated in what court the ſuit was commenced.

ASSUMPSIT. The plaintiff declared, Whereas he and the defendant were executors of the laſt will and teſtament of *J. S.*; and whereas the defendant had received ſo much of the money which was the teſtator's, a moiety whereof belonged to the plaintiff; and whereas the plaintiff *pro recuperatione inde ſectâſſet* the defendant; that he the ſaid defendant, in conſideration that the plaintiff *abſtineret à ſectâ præd. proſequendâ et monſtraret quoddam computum*, did promiſe him one hundred pounds; and avers, that he did forbear, &c.; *et quòd oſtentavit quoddam computum prædictum.*

JONES, after a verdict for the plaintiff, moved in arreſt of judgment, *for the defendant*, as followeth: Although I do not ſee how that which one executor claims againſt another, is recoverable at all, unleſs in equity; yet I ſhall inſiſt only on this, That here is

S. C. 2. Keb. 695. 703. S. C. Ray. 203. Ante, 43. 166. 7. Mod. 13. 2. Saund. 136. 1. Salk. 25. 29.

no good conſideration alledged; for it is only alledged in general, that the plaintiff *fecit aſſet*. It is not ſaid ſo much as that it was *legali modo*, in a legal way, whereas it ought to ſet forth in what court it was, &c. that ſo the Court might know whether it were in a court which had juriſdiction therein or no; and ſo are all the precedents in actions concerning forbearance to ſue. In point of evidence the firſt thing to be ſhewn in ſuch caſe as this is, that there was a ſuit, &c. SMITH *againſt* SMITH.

SAUNDERS, *for the plaintiff*. That being the prime thing neceſſary to be proved, ſince the verdict is found for us, it muſt be intended to have been proved. But however, if this conſideration be idle and void, yet the other maintains the action.

THE COURT agreed, That one good conſideration was enough. IT WAS ALSO AGREED, That if the plaintiff had averred only that he had ſhewed *quoddam computum*, that unleſs the conſideration had been to ſhew any account, it had been naught; for "*quoddam*" is "*aliud.*" *Dyer* 70. *Num.* 38, 39. 1. *Hen.* 7. *pl.* 9. But it being "*quoddam* **computum præd.*" it was well enough; for "*computum prædictum*" refers it to the particular account diſcourſed of between them.—IT WAS ALSO AGREED, That it had been beſt to have ſaid *monſtravit* in the averment, that it might agree with the allegation of the conſideration. But yet the word *oſtentavit*, though it moſt commonly, by *a metonymy*, ſignifies "*to boaſt*," yet it ſignifies alſo "*to ſhew*," or "*to ſhew often*," as appears by all the Dictionaries; and therefore it is well enough.—Take judgment. * [285]

Sir Francis Duncombe's Caſe. Caſe 31.

IT WAS HELD, That if a writ of error abate in parliament, or the like, and another writ of error be brought in the ſame court, it is no *ſuperſedeas*. But if the firſt writ of error be in the exchequer chamber, &c. and then a writ be brought in parliament, &c. it is a *ſuperſedeas* by the opinion of ALL THE JUDGES, againſt LORD COKE. *Vide Haydon v. Godſalve, Cro. Jac.* 241. 342. In what caſe a writ of error ſhall be a *ſuperſedeas*. S. C. 1. Vent. 100. Ante, 28. 106. 112.

2. Roll. 492. Raym. 5. 1. Vent. 31. 1. Sid. 413. 2. Lev. 93. 3. Mod. 125. 2. Leon. 120. Bunb. 64. 131. See 3. *Jac.* 1. c. 8. Cro. Jac. 135. 2. Burr. 746. 13. *Car.* 2. c. 2. 16. & 17. *Car.* 2. c. 8. 1. Term Rep. 279. 3. Term Rep. 390.

Browne *againſt* London. Caſe 32.

INDEBITATUS ASSUMPSIT for fifty-three pounds due to the plaintiff upon a bill of exchange drawn upon the defendant, and accepted by him, according to the cuſtom of the merchants, &c. An *indebitatus aſſumpſit* will not lie by an *indorſee* againſt the *acceptor* of a bill of exchange.

S. C. 2. Keb. 695. 713. 758. 822. S. C. 1. Lev. 298. S. C. 1. Vent. 152. S. C. 1. Freem. 14. Ante, 14. 2. Show. 5. Mod. 13. 367. 6. Mod. 129. 8. Mod. 373. 11. Mod. 100. 12. Mod. 37. 107. 345. 1. Salk. 125. 1. Ld. Ray. 175. 2. Ld. Ray. 753. 759. 1. Stra. 680. Gilb. Evidence, 4th edit. 110, 111.

BROWNE *againſt* LONDON.

After a verdict for the plaintiff, it was moved in arreſt of judgment, That though an *action upon the caſe* does well lie in ſuch caſe, upon the cuſtom of merchants, yet an *indebitatus aſſumpſit* may not be brought thereupon.

WINNINGTON. I think it doth well lie. Debt lies againſt a ſheriff upon levying and receiving of money upon an execution: *Hob.* 206. Now this is upon a bill of exchange accepted, and alſo upon the defendant's having effects of the drawer in his hands, having received the value; for ſo it muſt be intended, becauſe otherwiſe this general verdict could not be found.

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* RAINSFORD, *Chief Juſtice.* This is the very ſame with *Milton's Caſe*, lately in the court of exchequer, where it was adjudged, that an *indebitatus aſſumpſit* would not lie. In this caſe, he added, that the verdict would not help it; for though my LORD CHIEF BARON ſaid it were well, if the law were otherwiſe; yet HE and WE all agreed that a bill of exchange accepted, &c. was indeed a good ground for a ſpecial action upon the caſe; but that it did not make a debt:—FIRST, Becauſe the acceptance is but conditional on both ſides. If the money be not received, it returns back upon the drawer of the bill; he remains liable ſtill; and this is but collateral.—SECONDLY, Becauſe the word "*onerabilis*" doth not imply debt.—THIRDLY, Becauſe the caſe is *primæ impreſſionis:* there is no precedent for it.

OFFLEY, who was of counſel for the defendant in the caſe at bar, then ſaid, that he was of counſel for the plaintiff in the exchequer caſe, and that therein direction was given to ſearch for precedents; and that they did ſearch in this court, and in *Guildhall*, and that there was a certificate from the attornies and prothonotaries there, that there was no precedent of ſuch an action.---*Adjournatur.*

Vide 5. Co. 92, 93. 2. Roll. Rep. 312. Godb. 285. 1. Bac. Abr. 55, 56.

TWISDEN, *Juſtice.* I remember an action upon the caſe was brought, for that the defendant had taken away his goods, and hidden them in ſuch ſecret places, that the plaintiff could not come at them to take them in execution; and adjudged it would not lie.

It ſeems, that neither *debt* nor *indebitatus aſſumpſit* will lie on a bill of exchange, except when there is a *privity* between the parties, as between *the payee* and *the drawer*, or the *drawer* and the *acceptor*; 1. Mod. Ent. 312. Kyd on Bills, 114.; and between the *indorſee* and his *immediate indorſer*. *Per* LORD MANSFIELD, in Kepenbower v. Tims, at N. P. Eaſter, 22. Geo. 3. Bailey, 47.: but there is no privity between the *indorſee* and the *acceptor*. Hard. 485. 1. Vent. 152. Comb. 204. The modern practice of proceeding on a bill of exchange is by ſpecial *action on the caſe*, founded on the cuſtom of merchants. 1. Wilſ. 185. 1. Ld. Ray. 281. Kyd on Bills, 115.

Watkins *againſt* Edwards. Caſe 33.

Eaſter Term, 22. Car. 2. Roll 408.

ACTION OF COVENANT brought by an *infant* by his *guardian*, For that the plaintiff being bound apprentice to the defendant by indenture, &c. the defendant did not keep, maintain, educate, and teach him in his trade of a draper as he ought, but turned him away. The defendant pleads, That he was a citizen and freeman of *Briſtol*; and that at the general ſeſſions of the peace there held, there was an order, that he ſhould be diſcharged of the plaintiff, for his diſorderly living, and beating his maſter and miſtreſs; and that this order was enrolled by the clerk of the *peace, as it ought to be, &c. To which plea the plaintiff demurred.

The ſeſſions, by the 5. *Eliz.* c. 4. may either puniſh an apprentice, or may diſcharge the indentures, whether the application be on the part of the maſter or the apprentice.

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It was ſaid for the plaintiff, That the ſtatute of 5. *Eliz.* c. 4. doth not give the juſtices, &c. any power to diſcharge a maſter of his apprentice, in caſe the fault be in the apprentice, but only to miniſter due correction and puniſhment to him.

S. C. 1. Vent. 174. S. C. 2. Keb. 696. 745. 751. 760. 822. 872. Ante, 2. Cro. Car. 470. 530. 1. Saund. 313. 11. Mod. 204. 12. Mod. 27. 83. 349. 441. 553. 1. Salk. 67. 1. Stra. 143. 704. 2. Ld. Ray. 1410.

THE COURT. That hath been over-ruled here. The juſtices, &c. have the ſame power of diſcharging upon complaint of *the maſter*, as upon complaint of *the apprentice:* elſe the maſter would be in a moſt ill caſe who were troubled with a bad apprentice; for he could by no means get rid of him (*a*).

SECONDLY, It was urged on the plaintiff's behalf, That he had not, for aught that appears, any *notice* or *ſummons* to come and make his defence; 11. *Co.* 99. *Bagg's Caſe:* and this very ſtatute ſpeaks of the appearance of the party, and the hearing the matter before the juſtices, &c.

The ſeſſions cannot exerciſe their authority between maſters and ſervants, unleſs the party complained of be *ſummoned* to appear. Ante, 2. 5. Mod. 139. Sett. & Rem.

SAUNDERS, *for the defendant.* In this caſe the juſtices are judges; and it being pleaded that ſuch a judgment was given, that is enough, and it ſhall be intended all was regular.

1. Salk. 38. 2. Salk. 491. 1. Strange, 143. 1. Vent. 174. Seſſ. Caſ. 113. pl. 723. and ſee Mr. Conſt's edition of Bott's Poor Laws, vol. 1. page 513. 520.

TWISDEN and RAINSFORD, *Juſtices.* That which we doubt is, Whether the defendant ought not to have gone to one juſtice, &c. firſt, as the ſtatute directs, that he might take order and direction in it; and then, if he could not compound and agree it, he might have applied himſelf to the ſeſſions. For the ſtatute intended there ſhould be, if poſſible, a compoſure in private; and the power of the ſeſſions is conditional, *viz.* if the one juſtice cannot end it. In caſe of a baſtard-child, they cannot go to the

The ſeſſions have an *original juriſdiction* on the 5. *Eliz.* c. 4.

(*a*) And now by 20. Geo. 2. c. 19. ſ. 3. the ſame power is given to any two juſtices of the peace where the parties dwell. See Mr. Conſt's edition of Bott's Poor Laws, vol. 1. page 504. to 520. where all the ſtatutes and caſes upon this ſubject are collected.

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ſeſſions *per ſaltum*; and we doubt they cannot in this caſe. It is a new caſe. And then the matter will be, Whether this ought to be ſet down in the pleading?—*Adjournatur* (*a*).

(*a*) But it ſeems to be now ſettled, that the ſeſſions have an original juriſdiction upon this ſubject; Rex *v.* Johnſton, 3. Salk. 68. 1. Stra. 704. Rex *v.* Heaſeman, B. R. H. 101.; and that they may diſcharge the parties from each other on *proper cauſe*; Rex *v.* Hales Owen, 1. Stra. 99. 704. and order a proportionable part of the apprentice-fee to be returned; Hawkeſworth *v.* Hilary, ante, 2. Rex *v.* Amies, Conſt's Bott, vol. i. p. 515. But the party complained of muſt be ſummoned; Rex *v.* Rutter, Conſt's Bott, vol. i. p. 513. and Rex *v.* Gill, 1. Stra. 143. See alſo 20. Geo. 2. c. 19.

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Caſe 34.

* Rex *againſt* Ledginham.

Eaſter Term, 20. *Car.* 2. *Roll* 163.

An *information* does not lie againſt the lord of a manor for taking unreaſonable diſtreſs; but the remedy is by *action* on the ſtatute of *Marlebridge*.

S. C. ante, 71. S. C. 2. Keb. 687. 697. S. C. 1. Lev. 299. S. C. Ray. 193. 205. S. C. 1. Vent. 97. 104. S. C. 2. Danv. 651. S. C. Freem. 224.

INFORMATION ſetting forth, That he was lord of the manor of *Ottery St. Mary*, in the county of *Devon*, wherein there were many copyholders and freeholders, and that he was a man of an unquiet mind, and did make unreaſonable diſtreſſes upon ſeveral of his tenants, and ſo was *communis oppreſſor et perturbator pacis*.

It was proved at the trial, that he had diſtrained four oxen for three-pence, and ſix cows for eight-pence, being amercements for not doing ſuits of court, and that he was *communis oppreſſor et perturbator pacis*.

The defendant was found guilty. But it was moved in arreſt of judgment, That the information is ill laid:

FIRST, It is ſaid he diſquieted his tenants, and vexed them with unreaſonable diſtreſſes. It is true, that is a fault, but not a fault puniſhable in this way; for by the ſtatute of *Marlebridge*, c. 4. 2. *Inſt.* 106, 7. he ſhall be puniſhed by grievous amercements; and where the ſtatute takes care for due puniſhment, that method muſt be obſerved.

Ante, 34. 1. Lev. 146. 3. Lev. 48. 2. Inſt. 131. 107. 1. Hawk. P. C. 301. 2. Stra. 828. 10. Mod. 337.

An action for unreaſonable diſtreſſes muſt ſhew *how much*, and *of whom* taken.—S. C. 1. Vent. 108. S. C. 2. Keb. 697.

SECONDLY, As to the matter itſelf, they do not ſet forth how much he did take, nor from whom; ſo that the Court cannot judge whether it is unreaſonable or no, nor could we take iſſue upon them.

The charge of *communis oppreſſor* is too general.

2. Roll. Abr. 79. 6. Mod. 311. Moor, 302. 2. Hawk. P. C. 322. Burr. Rep. 2471.

THIRDLY, As to the *communis oppreſſor et perturbator pacis*, they are ſo general, that no indictment will lie upon them; as in *Cornwall's Caſe* (*a*), which indeed goeth to both the laſt points,

(*a*) Jones, 302.

TWISDEN,

TWISDEN, *Juſtice. Communis oppreſſor, &c.* is not good: ſuch general words will never make good an indictment, ſave only in that known caſe of *a barrator*; for "*communis barrectator*" is a term which the law takes notice of, and underſtands: it is as much, as I have heard judges ſay, as "a common knave," which contains all knavery. For the other point, *an information* will not lie for taking outrageous diſtreſſes. It is a private thing, for the which the ſtatute gives a remedy, *viz.* by *an action* upon the ſtatute *tam quam.*

REX *againſt* LEDGINHAM.

PER CURIAM. It is naught.—*Adjournatur* (*a*).

(*a*) The Court were unanimouſly of opinion, that the charge of *communis oppreſſor et perturbator pacis* is too general; S. C. 2. Keb. 697. S. C. 1. Lev. 299.; and that in proceedings for this injury it ought to be ſtated upon what tenants the diſtreſs was made, with their names, and how much was taken; S. C. 1. Vent. 108.: but the judgment was arreſted, becauſe an information will not lie for taking an *exceſſive diſtreſs*; for that the remedy is by ſpecial action on the ſtatute of *Marlebridge*. S. C. 1. Lev. 299. S. C. Ray. 205.—TRESPASS *vi et armis* will not lie for this injury at common law; Fitzg. 85.; for the entry is at firſt lawful; 2. Strange, 851. And no ſubſequent irregularity in making diſtreſs *for rent* (and by 17. Geo. 2. c. 38. for the *poor's rate*) will make the party a treſpaſſer *ab initio*. 11. Geo. 2. c. 19. Eſpinaſ. Dig. 56. 8.

* Roberts *againſt* Marriot.

Caſe 35.

Trinity Term, 22. Car. 2. Roll 944.

AN ACTION OF DEBT brought upon a bond to ſubmit to an award. The defendant pleads, *nullum fecerunt arbitrium.* The plaintiff replies, and ſets forth an award made by two prebends of *Weſtminſter*, and that it was delivered to the party according to the condition of the bond, &c. The defendant rejoins, that it was not delivered, &c.; *et hoc paratus eſt verificare.* The plaintiff demurs.

To debt on an award, if the defendant plead *no award*, and the plaintiff ſets out the award; if the defendant rejoin, that "it "was not de- "livered," and conclude with a *verification*, it is bad; for the rejoinder, which confeſſes an award, is *a departure*; and the affirmation that "it was "not delivered" ought to have concluded *to the country.*

BALDWIN and WINNINGTON, *Serjeants*, argued *for the defendant*; and JONES *for the plaintiff.*

THE COURT. The defendant having firſt pleaded *nullum fecerunt arbitrium*, and then, in his rejoinder, that it was *not delivered* (which is a confeſſion that there was an award made), has committed *a departure*; and ſo it has been judged. If he had pleaded *nullum fecerunt arbitrium, &c.* ABSQUE HOC that it was tendered, &c. it had been naught; and it is as bad now. ALSO when the plaintiff replies, that the award was delivered, and the defendant ſaith it was not, he ſhould have concluded *to the country*, and not, as he doth *et hoc paratus eſt verificare*; for otherwiſe the party might go *in infinitum*, and there would be no end of pleading.

S. C. ante, 42. S. C. 2. Keb. 614. 618. 702. S. C. 2. Saund. 73. 188. S. C. 1. Lev. 300. Ante, 72. 227. 8. Co. 133. 1. Saund. 102. 181. 10. Mod. 251. 257. 349. 12. Mod. 54. 92. 1. Ld. Ray. 30. 76. 234. 693. 2. Ld. Ray. 1449. Dougl. 58. 2. Term Rep. 439.

An award may be good in part.

NOTE, There was an exception taken to the award, *viz.* That it was awarded that there ſhould be a releaſe of all ſpecialties among other things; whereas ſpecialties were not ſubmitted.—THE COURT. Then the award is void as to that only: but indeed, if the breach had been aſſigned in not releaſing the ſpecialties, it had been againſt the plaintiff. But now take judgment.

12. Mod. 534. 2. Roll. Rep. 46. Cro. Eliz. 432. 758. Cro. Jac. 584. 10. Mod. 201. See Kyd on Awards, 165. to 178.

Caſe 36. Wood *againſt* Davies.

Trover for "*ricks of hay*" is good after verdict.

AN ACTION OF TROVER AND CONVERSION was brought *de tribus ſtruibus fœni*, ANGLICE, "ricks of hay." It was moved in arreſt of judgment, That it was too uncertain; for no man could tell how much was meant by *ſtrues*. It was urged it ſhould have been ſo many cart-loads or the like; for loads was adjudged uncertain in *Glyn's* * time here.—But RAINSFORD and MORTON, *Juſtices*, who only were in court, judged it well enough,

* [290]

S. C. 1. Lev. 30. S. C. 2. Keb. 703. Ante, 19. 46. 2. Stra. 738. 809. 1. Ld. Ray. 191.

Caſe 37. John Wootton *againſt* Penelope Hele.

Michaelmas Term, 21. *Car.* 2. *Roll* 210.

If huſband and wife levy a fine *ſur conceſſit* to *A.* for ninety-nine years, if he ſhould ſo long live, with a *general warranty* againſt all perſons during the ſaid term, an action of covenant will, on the death of *the huſband*, lie againſt *the wife* upon the warranty.

COVENANT UPON A FINE. The plaintiff declares, That whereas *quidem finis ſe levavit in curiâ nuper pretenſ. Cuſtodum libertatis* ANGLIÆ *authoritate Parliamenti de Banco apud* WESTMONAST. *&c. à die Sancti Michaelis in unum menſem anno Domini* 1649, *coram* OLIVERO ST. JOHN, JOHANNE PULISON, PETRO WARBURTON, *et* LEONARD ATKINS, *Juſtic. &c. inter præd.* JOHANNEM WOOTTON, &c. *quer. et præd.* JOHANNEM HELE *et* PENELOPEN HELE *per nomina* JOHANNIS HELE *armigeri, et* PENELOPES *uxoris ejus, deforc. inter alia de uno meſſuagio, &c. Per quem finem præd.* JOHANNES HELE *et* PENELOPE *conceſſerunt præd. tenementa præd.* JOHN WOOTTON *habendum et tenendum, &c. pro termino* 99 *annorum proximorum poſt deceſſum* GULIELMI WOOTTON, &c. *ſi* JOHANNES WOOTTON *modò querens et* GRACIA WOOTTON *tamdiu vixerint, aut eorum alter tamdiu vixerit, et præd.* J. HELE *et* PENELOPE *et hæred. ipſius* JOHANNIS *warrant. præd.* JO. WOOTTON *præd. tenementa, &c. contra omnes homines pro toto termino præd. prout per recordum finis præd.* &c. *plenius apparet. Virtute cujus quidem finis præd.* J. WOOTTON *fuit poſſeſſionat. de intereſſe præd. termini, &c. et ſic inde poſſeſſionat. exiſtens præd.* GULIEL. WOOTTON, &c. *poſtea, ſcil. ſexto die, &c. obierunt, poſt quorum mortem.*

S. C. ante, 66. S. C. 2. Saund. 177. S. C. 1. Lev. 301. S. C. 1. Sid. 466. S. C. 2. Keb. 684. 703. 709. 723. S. C. 2. Danv. 50. 1. Roll. Rep. 352. 2. Roll. Rep. 63. Godb. 276. Poph. 136. 1. Bulſt. 21. 3. Bulſt. 163. Cro. Jac. 240. 399. 521. 4. Co. 4. 2. Mod. 213. 3. Mod. 135. 10. Mod. 467. 476. 12. Mod. 444. 1. Lev. 301. 2. Lev. 37. 194. 3. Lev. 335. 1. Vent. 184. 2. Vent. 61. Vaugh. 118. Ray. 371. 1. Vern. 41. 2. Vern. 61. 3. Peer. Wms. 189. 2. Saund. 180.

præd

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præd. J. WOOTTON *in tenementa præd. &c. intravit et fuit inde poſſeſſionat. &c. et ſic inde poſſeſſionat. exiſtens præd.* J. HELE *poſtea, ſcil. &c. obiit et præd.* PENELOPE *ipſum ſupervixit. Et idem* JOHANNES WOOTTON *in facto dicit quòd quidem* HUGO STOWEL *armiger, poſt commenſationem termini præd. et durante termino illo et ante diem impetrationis hujus billæ, ſcil. &c. habens legale jus et titulum ad tenementa præd. &c. in et ſuper poſſeſſionem termini præd. ipſius* J. WOOTTON *in eiſdem intravit, ipſumq.* J. WOOTTON *contra voluntatem ipſius* J. WOOTTON *per debitum legis proceſſum à poſſeſſione et occupatione tenementorum præd. ejecit expulit et amovit, ipſumq.* J. WOOTTON *ſic inde expulſ. à poſſeſſione ſuâ inde cuſtodivit et extratenuit * et adhuc extratenet, contra formam et effectum finis et warrant. præd. Et ſic idem præd.* J. WOOTTON *dicit quòd præd.* PENELOPE *poſt mortem præd.* J. WOOTTON *licèt ſæpiùs requiſit. &c. conventionem ſuam præd. warrant. præd. non tenuit ſed infregit, ſed* J. HELE *eidem* WOOTTON *tenere omnino recuſavit et adhuc recuſat, ad dam. &c.* 600*l.* The defendant pleads, *repreſentando quòd eadem* PENELOPE *conventionem ſuam warrant. præd. à tempore levationis finis præd. ex parte ſuâ cuſtodiend. hujuſq. bene et fideliter cuſtodivit, repreſentandoq. quòd præd.* HUGO STOWEL *præd. tempore intrationis ipſius* HUGONIS *in tenementa præd. non habuit aliquod legale jus aut titulum ad eadem tenementa, &c. pro placito eadem* PENEL. *dicit, quòd præd.* H. STOWEL *ipſum* JOHANNEM *à poſſeſſione et occupatione tenementor. non ejecit expulit et amovit, prout præd.* JOHANNES *ſuperius verſus eam narravit; et hoc paratus eſt verificare.*

* [291]

Upon this, *iſſue* was taken; and a verdict for the plaintiff was found; and three hundred pounds damages: and upon a motion in arreſt of judgment, the cauſe was ſpoken to three or four times.

JONES, *for the defendant.* FIRST, It is conſiderable, whether an action will lie againſt a woman upon a covenant in a fine levied by her when *covert baron.* It would be inconvenient that land ſhould be unalienable, and therefore the law enables a *feme covert* to levy a fine; which fine ſhall work by *eſtoppel*, and paſs againſt her a good intereſt: but to make her liable to a perſonal action, thereupon to anſwer damages, &c, it were hard, and it is a caſe *primæ impreſſionis.*

For the plaintiff, it was ſaid, There is little queſtion but an action of covenant will well lie upon this warranty. The law enables a *feme covert* to corroborate the eſtate ſhe paſſes, and to do all things incident: if ſhe levy a fine of her inheritance ſhe may be vouched, or a *warrantia chartæ, &c.* thereupon be had againſt her; and ſo is the caſe of *Roll v. Oſborn*, *Hob.* 20. and if ſhe can thus bind her land, *à fortiori* ſhe may ſubject herſelf to a covenant, as in the caſe at the bar. If a huſband and wife make a leaſe for years, and ſhe accept the rent after his death, ſhe ſhall be liable to a covenant. Cowper, 201.

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This point was agreed by the counſel on both ſides, That a covenant in this caſe would lie againſt her; and ſo THE COURT agreed. TWISDEN, *Juſtice*, added, that there was no queſtion but a covenant would lie upon a fine; for (ſaith he) ſealing is not always * neceſſary to found an action of covenant. Thus covenant lies againſt the king's leſſee by patent upon his covenant in the patent, though we know there is no ſealing by the ſaid leſſee.

* [292]

In covenant on a general warranty againſt all perſons during the term, a breach aſſigned that *A. habens legale jus et titulum* entered, &c. is not, tho' after verdict, ſufficiently certain, without ſhewing what title *A.* had.

Ante, 66. 101.
9. Co. 61.
Co. Ent. 117.
Dyer, 328.
Yelv. 227.
Cro. Eliz. 823. 914.
Cro. Jac. 312.
2. Vent. 252. 271.
4. Mod. 78.
3. Mod. 135.
2. Lev. 37.
1. Lev. 83. 301.
2. Vent. 62.
3. Lev. 325.
Dougl. 43.
3. Bac. Abr. 715.
1. Term Rep. 671.
3. Term Rep. 584.

SECONDLY, It was urged on the defendant's behalf, That the breach of covenant is not well aſſigned, for it is not ſhewed what title *Stowel* had. It is not only participially expreſſed, "*habens legale, &c.*" but what is ſaid is altogether general and uncertain; *jus et legalem titulum ad tenementa præd.* (*a*): ſo that the breach aſſigned is in effect no more but that *Stowel* entered, and ſo the covenant was broken. If a man plead *Indemn. Conſervat.* he muſt ſhew how. In the caſe of *Gyll v. Gloſs, Yelv.* 227. *Cro. Jac.* 312. debt for rent on a parol leaſe, the defendant pleads, that the plaintiff "*nil habuit in tenementis prædictis, unde dimiſſionem prædictam facere potuit.*" The plaintiff replies, "*quod habuit, &c.*" in general, without ſhewing in ſpecial what eſtate he had, that ſo it might appear to the Court, that he had ſufficient in the lands whereout to make the leaſe; and therefore the replication was adjudged naught. It is true it was adjudged, that after the verdict it was helped by the ſtatute of *Jeofails*; but that I conceive was, becauſe the iſſue, though not very formal, yet was upon the main point, *viz.* Whether the leſſor had an eſtate in the tenements or no? For the true reaſon why a verdict doth help in ſuch a caſe is, becauſe it is ſuppoſed that the matter left out was given in evidence, and that the Judges did direct accordingly; or elſe the verdict could not have been found. So in our caſe, if the iſſue had been, Whether *Stowel* had right, &c. it might have been ſuppoſed and intended by his ſpecial title and eſtate made out and proved by trial: but here the iſſue going off on a collateral point, it cannot be intended, that any ſuch matter was given in evidence.

JONES and POLLEXFEN, *for the plaintiff.* This objection is againſt all the precedents, by which it appears, that alledging generally as we do, *habens legale jus et titulum*, is good. It is ſufficient for a man to alledge, that the covenantor had no power to demiſe, or was not ſeiſed, &c. without ſhewing any cauſe why, or that any other perſon was ſeiſed, &c. 9. *Co.* 61. *Cro. Jac.* 304. 369, 370. It is to be enquired upon evidence, Whether the party had a good title or no?—And ſo THE COURT agreed.

* [293]

In covenant on a general warranty for quiet enjoyment, the defect, in aſſigning a breach that *A. having* lawful title entered, &c. without ſhewing what *title* he had, is not cured by a verdict for the plaintiff, in an iſſue on a plea *proteſting* that *A.* had not any lawful title, and *affirming* that he did not diſturb the plaintiff.—Ante, 102. 3. Mod. 135. 1. Lev. 83. 2. Saund. 177. 3. Lev. 305. Carth. 389. Cro. Jac. 44. 3. Black. Com. 394. 5. Com. Dig. 44. 83. 1. H. Bl. Rep. 275. 1. Term Rep. 671.

* THIRDLY,—SAUNDERS, *for the defendant*, Though the plaintiff was very wary, bringing in the right of *Stowel* with *a participle*

(*a*) See Lloyd v. Tomkins, 1. Term Rep. 671.

only,

only, ſo that we could not *take iſſue* upon it, we could only *proteſt*; yet I agree, that having taken iſſue upon one point, we muſt admit, and do admit the reſt of the matter in the declaration: but that is only as it is alledged. Now here, therefore, we muſt admit, that *Stowel* had right and title, &c. but we do not admit that he had a title precedent to this fine, or had right otherwiſe than from and under the plaintiff himſelf; for that is not alledged. And it ſhall never be intended, no not after verdict, that *Stowel* had good and *eigne* right and title, before the leaſe granted by the fine; but the contrary ſhall be intended: and for that I rely upon the caſe of *Kirby v. Hanſaker*, *Cro. Jac.* 315, by all the Judges of the common pleas and exchequer, in the exchequer-chamber, in point. Nay, that is a ſtronger caſe than ours is; for there the iſſue, which was found for the plaintiff, was, that the recovery by *Eſſex*, who anſwers to *Stowel* in our caſe, was not by covin, but by lawful title; and yet, becauſe it was alledged that he had a good and *eigne* title, it was held to be ill, and not helped, and the judgment was reverſed. They ſaying that *Stowel* ejected him, &c. "*contra formam et effectum finis et warrant. præd.*" or if it had been, "*contra formam et effectum conventionis præd.*" is abſurd, and helps nothing; for *Stowel* could not do ſo, becauſe he is not party to the fine.

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Jones, *for the plaintiff.* It can never be intended that *Stowel* entered, &c. by a title under us, becauſe it is alledged to be "*contra* "*formam et effectum finis et warrant. præd. et contra voluntatem ip-*"*ſius* J. Wootton, *et eum à poſſeſſione ſuâ cuſtodivit, &c.*" Had it been by leaſe under us, the defendant ſhould have pleaded it: I doubt whether the defendant could have demurred: but certainly now the jury have found all this, it can never be intended as they would have it. As to the caſe that has been cited between *Kirby v. Hanſaker*; I ſay it is not alledged ſo clearly there, as here: It is not ſaid there, that the leſſee was poſſeſſed, and that the recoveror entered into and upon his poſſeſſions, and ejected him.—Secondly, Theſe words "*contra formam, &c.*" are not in that caſe.—Thirdly, In that caſe the court of king's bench was of opinion that the verdict had made it good.—Fourthly, The roll of that caſe is not to be found; here is a man *will make oath that he hath ſearched four years before and after the time when the caſe is ſuppoſed to have been, and cannot find it. * [294]

Rainsford and Morton, *Juſtices*, were at firſt of opinion that the verdict had helped it. For, ſaith Rainsford, If *Stowel* had title under the plaintiff, it could not have been found, that there was a breach of covenant. But afterwards they ſaid, that the caſe of *Kirby v. Hanſaker* came ſo cloſe to it, that it was not to be avoided, and they were unwilling to make new precedents. Cro. Jac. 315.

Twisden, *Juſtice.* That book is ſo expreſſed, that it is not an ordinary authority; it is not to be waived. But I was of the ſame opinion, before that book was cited. For here it is poſſible *Stowel* might have a leaſe from *Wootton* ſince the fine. Now the warranty doth not extend to *puiſne titles*. The defendant ſhould have ſaid, that

WOOTTON *againſt* HELL.

that *Stowel* had *priorem titulum*, &c. When a good title is not ſet forth in the declaration to entitle the plaintiff to his action, it ſhall never be helped. There was an action upon the ſtatute of monopolies, for that the defendant entered, I ſuppoſe by pretext of ſome monopoly-commiſſion, &c. *et detinuit* certain goods; but it was not ſaid they were his, the plaintiff's; and though we had a verdict, yet we could never have judgment. In the caſe of *Cule v. Thorn* (*a*), an action brought upon a promiſe to give ſo much with a child, *quantum daret* to any other child, and it was alledged, that *dedit* ſo much; and becauſe that it might be before the time of the promiſe, it was held naught after verdict. It may be the roll of *Kirby v. Hanſaker* is not to be found, no more than the roll of *Middleton v. Cleſman*, reported *Yel.* 65.; but certainly CROKE and YELVERTON, *Juſtices*, were men of that integrity, they would never have reported ſuch caſes, unleſs there had been ſuch. There are many loſſes, miſcarriages and miſtakes of this kind. Pray, where will you find the roll of the decree for the titles in *London*? yet I have heard the Judges ſay, they verily believe it is upon a wrong roll.

Cro. Jac. 315. 2. Saund. 180. 2. Ld. Ray. 1228.

THE COURT gave judgment, *nil capiat per billam*.

(*a*) Cro. Car. 186.

*[295]

Caſe 38.

* The King *againſt* Neville.

Trinity Term, 22. Car. 2. Roll 9.

An indictment on a ſtatute muſt purſue the material words of it.

INDICTMENT on the ſtatute 31. *Eliz.* c. 10. (*b*) for erecting a cottage for habitation *contra formam ſtatuti* was quaſhed, Becauſe it was not ſaid that any inhabited it; for elſe it is no offence. *Per* RAINSFORD and MORETON, *Juſtices*, *qui ſoli aderant*.

S. C. 2. Keb. 693. 703. Stiles, 33. 1. Stra. 405. 12. Mod. 406. Dougl. 94.

(*b*) Repealed by the 15. Geo. 3. c. 32. and ſee 4. Bl. Comm. 168.

Caſe 39.

Jemy *againſt* Norrice.

Trinity Term, 22. Car. 2. Roll 1220.

An *aſſumpſit* on a *quantum meruit* for "one *pair* "of gloves" and "a *parcel* "of thread," held ſufficiently certain.

A WRIT OF ERROR was brought of a judgment given in the common pleas, in an action upon a *quantum meruit*, for wares ſold.

FIRST, One of them is *unum par chirothecarum*; but it is not ſaid of what ſort.—TWISDEN, *Juſtice*. It is good enough, however; ſo it has been held *de coriis*, without ſaying *bovinis*, &c. *de libris*, without ſaying what books they were.

S. C. 2. Keb. 704. 715. S. C. 1. Lev. 303. S. C. 1. Vent. 105. Ante, 46. 294. 1. Lev. 301. Stiles, 360. 419. 2. Saund. 374. Comyns, 89. 6. Mod. 87. 12. Mod. 308. 511.

SECONDLY,

JENT *againſt* NORRICE.

SECONDLY, Another is *parcella fili:* which, it was ſaid, was uncertain, unleſs it had been made certain by an *Anglicè:* for though it was agreed it had been good in an *indebitatus aſſumpſit*, yet in this caſe there muſt be a certainty of the debt. Such a general word cannot be good, no more than in a trover.—TWISDEN, *Juſtice.* If an *indebitatus aſſumpſit* ſhould be brought for twenty pounds for wares ſold, and no evidence ſhould be given of an agreement for the certain price, I ſhould direct it to be found ſpecially (*a*). But "*parcella fili*" ſeems to be as uncertain as "pairs of hangings (*b*)."

THE COURT. It is doubtful; but, however, let the judgment be affirmed, *niſi*, &c.

(*a*) Ruſſell v. Collins, ante, 8. (*b*) Taylor v. Wills, ante, 46.

* [296]

* Foxwith and Others *againſt* Tremain.

Caſe 40.

Trinity Term, 21. *Car.* 2. *Roll* 1512.

FOR THE PLAINTIFF. The two parties, who are infants, may well ſue by attorney, as they do. The authorities are clear, *Cotton v. Weſtcott* (*a*), *Powell v. Onſlow* (*b*), *Weld v. Rumney* (*c*). We beg leave to mention eſpecially what you MR. JUSTICE TWISDEN ſaid there; though indeed we do not know, nor can be very confident that it is reported right. (TWISDEN. I do proteſt not one word of it true they went about.) But the caſe of *Bade v. Starkey* (*d*), and eſpecially the *Counteſs of Rutland's Caſe* (*e*), is expreſs in our point. In the alledgment of the caſe of *Bade v. Starkey*, by *Rolle* (*f*), there is indeed a *quære* made, becauſe an infant might by this means be amerced. But that reaſon is a miſtake; for it appears by *Dyer* 383. *Co. Lit.* 127. and 1. *Roll. Abr.* 214. that an infant ſhall not be amerced (*g*).

Several executors or adminiſtrators may ſue by *attorney*, though ſome of them be *infants*; for all repreſent the perſon of the teſtator, and ſue *en auter droit*; but if ſuch executors or adminiſtrators be ſued, the *infants* muſt defend by *guardian*.

S. C. ante, 47. 72. S. C. 2. Keb. 537. 625. 633. 691. 698. S. C. Ray. 198. S. C. 1. Sid. 449. S. C. 2. Saund. 212. S. C. 1. Vent. 102. S. C. 1. Lev. 299. Yelv. 130. Hob. 72. 1. Leon. 74. 5. Co. 29. 6. Co. 67. 2. Lev. 181. Fitzg. 1, 2. *contra.* 8. Mod. 25. 2. Stra. 784. 1076. 1. Ld. Ray. 232. 600. 8. Ld. Ray. 1449. 2. Saund. 212.

MORETON, *Juſtice.* I take the law to be, that where an infant ſues with others *en auter droit*, as here, he ſhall ſue by attorney; for all of them together repreſent the teſtator I ground myſelf upon the authorities which have been cited, and the caſe of *Smith v. Smith*, *Yelv.* 130. Alſo it is for the infant's advantage to ſue by attorney. But if he be a defendant, he may appear by guardian. I think the parties may all join in this ſuit, though perhaps in the caſe of *Hatton v. Maſkall* (*h*) they could not: for in that caſe it

(*a*) Cro. Jac. 420. 441. Poph. 130. 1. Roll. Rep. 380.
(*b*) 1. Roll. Abr. 288. pl. 2.
(*c*) Styles, 318.
(*d*) Cro. Eliz. 542. Godb. 106.
(*e*) Cro. Eliz. 378. Owen, 156. Moor, 866.
(*f*) 1. Roll. Abr. 288.
(*g*) See the argument at the *bar* for the defendant, poſt. 299.
(*h*) 1. Keb. 750. 2. Saund. 212. Ray. 198. 1. Lev. 181.

appeared

FORWITH AND OTHERS *againſt* TELMAIN.

appeared that the wife only, who was plaintiff, was the executrix. So he concluded, that judgment ought to be given for the plaintiffs.

RAINSFORD, *Juſtice, accordant.* This caſe is ſtronger than where a ſingle perſon is made executor or adminiſtrator. For though *Rolle* in his *Abridgement* makes a *quære* of the caſe of *Bade v. Starkey*, yet in abridging the caſe of *Holland v. Lee* (*a*), which is our caſe, he agrees clearly with the *Counteſs of Rutland's Caſe*, in *Cro. Eliz.* 377, that the infant, as well as the other executors, ſhall ſue by attorney. The reaſons objected on the contrary are, That an infant cannot make an attorney, and that he may be prejudiced hereby. I anſwer, That the executors of full age have influence upon the infants, and they are entruſted to order and manage the whole buſineſs; and therefore the adminiſtration *durante minore* ſhall not be granted: ſo in this caſe, he
* [297] ſhall have privilege * to ſue by attorney, becauſe he is accompanied with thoſe which are of full age. I conclude, I have not heard of any authority againſt my opinion; and how we can go over all the authorities cited for it, I do not know.

TWISDEN *contra.* This is an action upon the caſe, For that the defendant was indebted for damages clearly received to the teſtator's uſe; and indeed I do not ſee otherwiſe how it would lie. Two queſtions have been made: FIRST, Whether all the executors may, or muſt join? I confeſs I have heard nothing againſt this, *viz.* but that they may join. But I cannot ſo eaſily as my brothers ſlubber over all the authorities cited, eſpecially the caſe of *Hatton v. Maſkall*, which, I confeſs, is a full authority for this, that they need not join. The caſe was thus: The teſtator recovers a judgment, and dies, making his will thus: "Alſo, I "deviſe the reſidue of my eſtate to my two daughters, and my "wife, whom I make my executrix." I confeſs I cannot tell why, but the ſpiritual court did judge them all, both the two daughters as well as the wife, to be executrixes; and therefore we the Judges muſt take them to be ſo. The wife alone proves the will, with a *reſervatâ poteſtate* to the daughters, when they ſhould come in. But this makes nothing at all in this caſe; I think this is according to their uſual form. The wife alone ſues a *ſcire facias* upon this judgment, and therein ſets forth this whole matter, *viz.* That there were two other executrixes, which were under ſeventeen, &c. It was adjudged for the plaintiff, and affirmed in a writ of error in the exchequer chamber, that the *ſcire facias* was well
Ante. 79. Hob. 72. brought by her alone. But firſt, I cannot ſee how a writ of error ſhould lie in that caſe in the exchequer chamber; for it is not a cauſe within 27. *Eliz.* c. 2. What reaſon is there for judgment? A reaſon may be given, That before an executor comes to ſeventeen, he is no executor. But I ſay he is *quoad eſſe*, though not

(*a*) 1. Roll. Abr. 288. pl. 4.; and ſee S. C. under the title of *Darcey v. Jackſon*, Palm. 149. 224. 1. Roll. Rep. 73. 301. Bridg. 69. Moor 622. Cro. Eliz. 77. 739.

quoad

quoad executionem. A wife adminiſtratrix under ſeventeen ſhall join with her huſband in an action; and why ſhall not the infants as well in our caſe? The caſe of *Smith v. Smith*, *Yelv.* 130. is expreſs, that the infant muſt join, and be named. It is clear, that no adminiſtration *durante minore ætate* can be committed in this caſe; for all the executors make but one perſon, and therefore why may not all join?—SECONDLY, Admitting they may join, Whether the infants may ſue by attorney? I hold, that in no caſe an infant ſhall ſue or be ſued either in his own or *auter droit*, by attorney. * There are but four ways by which any man can ſue, *in propriâ perſonâ*, by *attorney*, by *guardian*, and by *prochein amy*. An infant cannot ſue *in propriâ perſonâ*: That was adjudged in *Dawkes v. Peyton (a)*. It was an excellent caſe, and there were many notable points in it. *Firſt*, It was reſolved, That a writ of error might be brought in this court, upon an error in fact in the petty bag. *Secondly*, That the entry being general, "*venit* ſuch a one," it ſhall be intended to be *in propriâ perſonâ*. *Thirdly*, That it was error for the infant, in that caſe, to appear otherwiſe than by a guardian. *Fourthly*, That the error was not helped by the ſtatute of *Jeofails*. In a caſe between *Colt v. Sherwood*, in *Michaelmas Term* 1649, an infant adminiſtrator ſued and appeared *per gardianum*; and it appeared upon the record, that he was above ſeventeen years of age. I was of counſel in it, and we inſiſted it was error; but it was adjudged, that he appeared as he ought to appear; and that he ought not to appear by attorney. And the reaſons given were; *Firſt*, Becauſe an infant cannot make an attorney by reaſon of his inability. *Secondly*, Becauſe by this means an infant might be amerced *pro falſo clamore*. For when he appears by attorney, *non conſtat*, unleſs it happen to be eſpecially ſet forth, that he is an infant, and ſo he is amerced at all adventures; and to relieve himſelf againſt this he has no remedy but by a writ of error. For error in fact cannot be aſſigned *ore tenus*. And it were well worth the coſt to bring a writ of error to take off an amercement. But it is ſaid, That the infants may appear by attorney in this caſe, becauſe they are coupled and joined in company with thoſe of full age. I think that makes no difference, for that reaſon would make ſuch appearance good, in caſe that they were all defendants. But it is agreed, that if an infant be defendant with others who are of full age, he cannot appear by attorney. The reaſon is the ſame in both caſes. If an infant and two men of full age join in a feoffment, and make a letter of attorney, &c. this is not good, nor can in any ſort take away the imbecility which the law makes in an infant. I conclude, I think the plaintiffs ought to join; but the infants ought to appear by guardian. But ſince my two brothers are of another mind, as to the laſt point, there muſt be judgment, that the defendant *reſpondeat ouſter*.

* [298]

2. Saund. 212.

(a) Styles, 216. 218. 1. Roll. Abr. 747.

NOTE,

FOXWITH AND OTMERS *againſt* TREMAIN.

* NOTE,—COLEMAN argued *for the defendant.* His argument, which ought to have been inſerted above, was to this effect: FIRST, Theſe five cannot join. Had there been but one executor, and he under ſeventeen years, the adminiſtrator *durante minore ætate* ought to have brought the action: 5. *Co.* 29. a. But ſince there are ſeveral executors, and ſome of them of full age, there can be no adminiſtration *durante minore ætate.* Thoſe of full age muſt adminiſter for themſelves, and the infants too. But the courſe is, that executors of full age prove the will, and the other, that is under age, ſhall not come in till his age of ſeventeen years. But now the queſtion is, How this action ſhould have been brought? I ſay, According to the precedent of *Hatton v. Maſkall,* which was in the exchequer chamber, *Michaelmas Term,* 15. *Car.* 2. *Roll* 703. wherein the executor, who was of full age, brought the *ſcire facias,* but ſet forth, That there were other two executors who were under age, and therefore they who were of full age pray judgment; and it was reſolved, the *ſcire facias* was well brought: and they agreed, That the caſe in *Yelv.* 130. was good law; becauſe in that caſe it was not ſet forth ſpecially in the declaration, that there was another executor under age. So that they reſolved, That the executor of full age could not bring the action without naming the others.—SECONDLY; However, the infants ought to ſue by guardian; and where *Rolle,* and other books ſay, that where ſome are of age and ſome under they may all ſue by attorney, it is to be underſtood of ſuch as are indeed under twenty-one, but above ſeventeen. *Reſpondeas ouſter.*

Ante, 297.

After this the ſuit was compounded.

EASTER TERM,

The Twenty-Second of Charles the Second,

2. Com. Dig. 167.

IN

The Court of Chancery.

Charles Fry and Anne his Wife, *againſt* George Porter.

Caſe 1.

THE CASE was, MONTJOY EARL OF NEWPORT was ſeiſed of an houſe called *Newport-houſe*, *&c.* in the county of *Middleſex*, and had three ſons, who were then living; and two daughters, VIZ. *Iſabel* married to *The Earl of Banbury*, with her father's conſent, who had iſſue *Anne*, the plaintiff; and *Anne* married to *Mr. Porter*, without her father's conſent, who had iſſue *D.* Both theſe daughters died.

A. had iſſue three ſons and three daughters. The eideſt daughter had iſſue *B.* The youngeſt daughter had iſſue *C.*—*A.* deviſes an eſtate to his wife for life, "and after her death to *B.* and the heirs of her body: provided always, and upon condition, that ſhe marry with the conſent of *D.*; and in caſe ſhe marry without ſuch conſent, or die without iſſue, then I bequeath the ſaid eſtate to *C.*"—This is a *limitation*, and not a *condition*; and therefore if *B.* marry without the conſent of *D.* it is a determination of the eſtate-tail, and caſts the poſſeſſion upon *C.* by way of immediate remainder, although *B.* had no notice of this limitation previous to her marriage.—S. C. ante, 86. S. C. 1. Freem. 31. S. C. 1. Vent. 199. S. C. Ray. 236. S. C. 2. Lev. 21. S. C. 2. Keb. 756. 787. 814. 867. S. C. 3. Keb. 19. S. C. 1. Eq. Abr. 111. S. C. 1. Ch. Caſ. 138. S. C. 2. Ch. Rep. 26. Gilb. Eq. Rep. 26. 147. 188. 11. Mod. 48. 12. Mod. 182. 2. Vern. 333. 580. 721. Prec. Chan. 565. Abr. Eq. 110. 282. 1. Peer. Wms. 284. 2. Peer. Wms. 419. (626). 628. Caſes Temp. Talb. 164. 212. Comyns, 726. 757. 3. Peer. Wms. 65. 238. Lord Nettervil's Caſe, in the Houſe of Lords, April, 1737. Ambler, 256. 259.

The Earl of Newport made his will in this manner: "I GIVE "and bequeath to my dear wife the *Lady Anne, Counteſs of New-* "*port*, all that my houſe called *Newport-houſe*, and all other my "lands, &c. in the county of *Middleſex*, for her life. And after "her death, I give and bequeath the premiſes to my grandchild "*Anne Knollis*," VIZ. the plaintiff, "and to the heirs of her "body: PROVIDED ALWAYS, and upon condition, that ſhe "marry with the conſent of my ſaid wife, and the *Earl of War-* "*wick*, and the *Earl of Mancheſter*, or of the major part of "them. And in caſe ſhe marry without ſuch conſent, or happen "to die without iſſue, then I give and bequeath it to *George Por-* "*ter*," VIZ. the defendant.

THE EARL died. *Anne* the plaintiff married *Charles* the plaintiff, ſhe being then about fourteen or fifteen years old, without the conſent of either of the truſtees.

FRY AND HIS WIFE *againſt* PORTER.

And thereupon now a bill was preferred to be relieved againſt this condition and forfeiture, becauſe ſhe had * no notice of this condition and limitation made to her, &c. To this the defendant had demurred, but that was over-ruled. Afterwards there were
* [301] ſeveral depoſitions, &c. made and teſtified on each ſide, the effect of which was this.

On the plaintiff's part it was proved by ſeveral, that it was always THE EARL's intention, that the plaintiff ſhould have this eſtate, and that they never heard of this purpoſe, to put any condition upon her; and believed that he did not intend to give away the inheritance from her; but that this clauſe in the will was only *in terrorem*, and cautionary, to make her the more obſequious to her grandmother. The two earls ſwore, that they had no notice of this clauſe in the will; but if they had, they think it poſſible ſuch reaſon might have been offered, as might have induced them to give their conſents to the marriage; and that now they do conſent to, and approve of the ſame. Some proof was made, that the *Counteſs of Newport* had ſome deſign that the plaintiff ſhould not have this eſtate, but that the defendant ſhould have it. But at laſt even ſhe (*viz.* the counteſs) was reconciled, and did declare, that ſhe forgave the plaintiff's marriage, and that ſhe ſhewed great affection to a child which the plaintiff had; and directed, that when ſhe was dead, the plaintiff and her child ſhould be let into the poſſeſſion of the premiſes, and ſhould enjoy them, &c. It was proved alſo, that when there had been a treaty concerning the marriage between my *Lord Morpeth* and the plaintiff, and the plaintiff would not marry him, her grandmother ſaid, "ſhe ſhould marry whom ſhe would, ſhe "would take no further care about her." (The counteſs was dead at the time of this ſuit). It was proved, that *Mr. Fry* was of a good family, and that the defendant had five thouſand pounds appointed and provided for him by his grandfather, by the ſame will.

On the defendant's part, it was ſworn by the ſaid late *Counteſs of Newport*, VIZ. in an anſwer made formerly to a bill brought againſt her by the now defendant for preſerving of teſtimony (which was ordered to be read), that the marriage was private, and without her conſent and approbation, and that ſhe did not conceive it to be a fit and proportionable marriage, he being a younger brother, and having no eſtate. The like was ſworn by the *Earl of Portland*, the ſaid counteſs's then huſband, and that it appeared ſhe leaped over
* [302] a wall (by means of a wheel-barrow ſet up againſt it) to go * to be married; and that as ſoon as the truſtees did know of the marriage they did diſavow and diſlike it, and ſo declared themſelves ſeveral times, and ſaid, That had they had any hint of it, they would have prevented it. Others ſwore that the *Earl of Portland* declared, upon the day of her going away, "that he never conſented "thereto;" and that the counteſs deſired then, that he would not do any thing like it; and that the *Earl of Warwick* ſaid, he would have loſt one of his arms rather than have conſented to the ſaid marriage.

On

FRY AND HIS WIFE *againſt* PORTER.

On hearing of this cauſe before the maſter of the rolls, *viz.* SIR HARBOTTLE GRIMSTONE, *Bart.* the plaintiff obtained a decretal order, (*viz.*) That *Anne*, the plaintiff, and her heirs ſhould hold the premiſes quietly againſt the defendant and his heirs, and that there ſhould be an injunction perpetual againſt the defendant, and all claiming under him.

And now there was an appeal thereupon, and re-hearing before SIR ORLANDO BRIDGMAN, *Knt.* then lord-keeper, aſſiſted by the two lord chief juſtices, and the chief baron, before whom it was argued thus:

MAYNARD, *Serjeant.* The plaintiff ought not to have relief in this caſe. The plaintiff's mother had a ſufficient proviſion by the *Earl of Newport*'s care; and therefore there is leſs reaſon that this eſtate ſhould be added to the daughter. The noble lords the truſtees, when the thing was freſh, did diſapprove the marriage, however they may conſent thereunto now. The deviſe was to the plaintiff, but in tail, and afterwards to the defendant. We diſparage not *Mr. Fry* in blood, nor family; but people do not marry for that only, but for recompence and like fortune. There was a public fame or report (it is to be preſumed) of this will in the houſe; and were there not, yet it was againſt her duty, and againſt nature, that ſhe ſhould decline aſking her grandmother's conſent; and *Mr. Fry*, in honour and conſcience, ought to have aſked it: and therefore this practice ought not to receive the leaſt encouragement in equity. It is true, when there was a demurrer, it was over-ruled, becauſe the bill prayed to be relieved againſt a forfeiture, for which there might be good cauſe in equity. But now it does not appear there is any in the caſe. The * eſtate is now in the defendant, and that not by any act of his own, but by the deviſor and the plaintiff. This is *a limitation*, not *a condition*; for my *Lord Newport* had ſons: it is ſomewhat of the ſame effect with *a condition*, though it is not ſo. We have a title by the will of the dead, and the act of the other party without fraud, or other act of us; and therefore it ought not to be defeated. I take a difference between a deviſe of *land* and *money*; for land is not originally deviſeable, though money is. By the civil law and amongſt civil lawyers, it has been made a queſtion, Whether there ſhall be relief againſt ſuch a limitation in a deviſe? But be that how it will, chattels are ſmall things, but a freehold ſettled ought not to be deveſted thus: no man can make a limitation in his will better and ſtronger to diſappoint his deviſe, conditionally, than this is made. If my *Lord Newport* had been alive, would he have liked ſuch a practice upon his grand-daughter as want of notice? In *Organ's Caſe* (*a*), and *Sir Julius Cæſar's Caſe* (*b*), there was a grant to an infant on condition to pay ten ſhillings, and no notice given thereof before it was payable; yet becauſe

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Note this diſtinction.

(*a*) Organ *v.* Gardiner, 1. Eq. Abr. 82. 2. Chan. Caſ. 231.
(*b*) Caſar *v.* Cator, Toth. 82.

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nobody was bound to give notice, it was adjudged againſt the infant.

SIR HENEAGE FINCH, *Solicitor General.* The witneſſes who ſwear that the earl ſaid, "he would give the eſtate to her," prove nothing to the purpoſe; for he did ſo but upon a condition, that they did not hear. The after conſent of the earl, or the counteſs, ought not to make it good; which conſent at laſt perhaps was extorted by importunity or compaſſion, for at firſt they diſapproved of the marriage. Marrying without conſent, and dying without iſſue, are coupled in the ſame line, and the eſtate ſhall as effectually paſs over to the defendant upon the one limitation as the other. For ſuch conſent is matter *ex poſt facto*, and ſuſpiciouſly to be ſcanned; for we ought in this caſe by law to proceed ſtrictly, and not derogate from my *Lord Newport*'s intent, which plainly appears by the letter of his will, that his grandchild ſhould aſk conſent of ſuch he had thereby appointed to conſent before her marriage were ſolemnized, the actual ſolemnization of which was an act ſo permanent, that it would admit of no alteration or diſſolution; an act of ſuch force and efficacy, tending clearly and immediately to the ruin of their right and
* [304] title to the eſtate in queſtion, and * rendering it wholly incapable of reviver by any other means than what the common and civil laws of this realm do permit. The poſt conſent therefore will not avail the plaintiffs in this court: otherwiſe the defendant claiming by this limitation ſhould have indeed advantage, but ſuch as is inconſiderable, being liable to alteration by the pleaſure of this court: and for a ſtrict obſervation of the teſtator's words, the ſame ought to be in equity as well as at law. What great reſpect the old heathens paid to the wills of deceaſed perſons may appear in theſe following verſes:

"*Sed legem ſervanda fides, ſuprema voluntas,*
"*Quod mandat, fierique jubet, parere neceſſe eſt.*"

The counteſs ſaying, likely in paſſion, that "ſhe might marry "whom ſhe would, &c." did not amount to a dormant warrant to her to marry without conſent. I am upon conjecture ſtill, that the plaintiffs will inſiſt upon theſe particulars, for it looks as if they would, becauſe they read them. Doubtleſs the primary intention of the clauſe was *in terrorem*; but the ſecondary was, that if ſhe offended, ſhe ſhould undergo the penalty. His intention is to be gathered out of the words only, and whatever they
Cro. Car. 476. ſay the Earl intended, does not preſs the queſtion. Our freehold is ſettled in us by virtue of an act of parliament. I lay it down for a foundation, that a father may ſettle his eſtate ſo as that the iſſue ſhall be deprived of it for diſobedience, and not be relievable in equity: and now it is not poſſible, that any counſel could adviſe a man to do it ſtronger than it is done in this caſe; and ſhall a child break theſe bonds, and look diſobedience in the face
Poſt. 694. 699. here? If it had been only provided, that ſhe ſhould marry with

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the conſent, &c. and no further, it might have been ſomewhat; but ſince he goes on, and makes a limitation over, &c. he becomes his own chancellor, and upon this difference are all the precedents, and even thoſe of deviſing portions, *viz.* deviſing them over or not, as I have underſtood. Infancy can be no excuſe in caſe of the breach of a condition of an eſtate in which the infant is a purchaſor: ſo that nothing reſts now in this caſe but the point of notice. And why ſhould not the infant be bound to take notice in this caſe, as he is to take notice in caſe of a remainder wherein he is a purchaſor? But if notice * be neceſſary, it is not to be tried here now. If we had brought an ejectment, and (ſuppoſing notice had been neceſſary) we had failed in the proof thereof, ſhould we have been barred for ever, as by this perpetual injunction we ſhould be? And ſhall it be done now without proof? If we are not bound to prove notice at law, much leſs are we bound to prove it here. This caſe is epidemical, and concerns all the parents of England that have or ſhall have children, that the obligations which they lay upon their children may not be cancelled wholly, and this court (under colour of equity) protect them in it, and be a city of refuge for relief of ſuch, the foulneſs of whoſe actions deny them a ſanctuary.

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PECKE. If infancy would excuſe, ſuch a clauſe would ſignify nothing; for moſt perſons, eſpecially of that ſex, marry before full age. The lords give no reaſon why they changed their opinions.

FOUNTAIN, *Serjeant*. The caſe of *Yelverton v. Yelverton* (*a*) is a precedent in the point for us, and *Shipdam's Caſe* (*b*) is much like it; this being of a deviſe of land, and that of money; which if it were paid, the land was to go over. The grand objection is, That here is an eſtate veſted by a ſettlement, which is not to be avoided or defeated. But I doubt whether a man can lay ſuch a reſtraint, that there ſhall not be relief in any caſe of emergency and contingency. It is a part of the fundamental juſtice of the nation, that men ſhould not make limitations wholly unalterable; as by the common law men cannot make a fee unalienable. You give relief every day where there are expreſs clauſes, that there ſhall be no relief in law or equity; where a thing is appointed to be, &c. without relief in law or equity, you relieve againſt them, and look upon them to be void. In our caſe, ſuppoſe ſhe had married a great lord, or ſuppoſe a perſon had brought notice of the truſtees conſent, Would you not have given relief? But ſecondly, I deny the aſſumption. This caſe is not ſo. I agree it had been well done if they had aſked my *Lady Newport's* conſent. But is there a word in the will, that if the plaintiff did not, he ſhould have no relief in equity? The eſtate was deviſed to my *Lady Newport* during her life (ſo that the plaintiff could not be in poſ-

See 3. Leon. 37.

(*a*) 2. Roll. Abr. 79. 790. Noy, 19. Moor. 342. 375. Cro. Eliz. 401.
(*b*) 1. Sid. 25.

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ſeſſion), and ſhe might have lived till the plaintiff was twenty-one years old. Could not my *Lady Newport* have ſaid, "Have a care "how you marry, * for you forfeit the eſtate, if you marry with- "out the conſent of two of us three?" All ingredients and cir- cumſtances muſt be taken in a matter of equity. It is an argu- ment to ſay, He has no eſtate, therefore take away his wife's eſtate, then there will be nothing to maintain her. It is agreed, That if the approbation had been precedent, it had been well. Now ſhe had no notice, before the marriage, that it was neceſſary, and when ſhe had that notice, ſhe got the approbation; and that, though ſubſe- quent, is good enough, becauſe it was aſked (and gotten) as ſoon as ſhe had notice that ſhe ought to have it. The will is hereby ſufficiently obſerved, for the intent of the will was, That ſhe ſhould have ſuch a huſband as thoſe perſons ſhould approve, and this marriage is ſo approved. I rely upon this matter, but eſpe- cially upon the word of notice.

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ELLIS, *Serjeant* There was a caſe of a *proviſo* not to marry, but with the conſent of certain perſons firſt had in writing. Con- ſent was had, but not in writing, and yet you ruled it good. Had this been a condition in law (as it is in fact), the law would have helped her. If the eſtate had been in her, there might have been ſome reaſon that ſhe ſhould have taken notice how it came to her; and of the limitation, &c. Had the earl been alive and con- ſented to the marriage after it was ſolemnized, he would have continued his affection, and the plaintiffs have had the eſtate ſtill. Why now, the conſent of the lords and counteſs is as much as his conſent: he had transferred his conſent to them. This is a *ratihabitio*, you cannot have a caſe of more circumſtances of equity: FIRST, An infant. SECONDLY, No notice. THIRDLY, Con- ſent after. FOURTHLY, Their declaration that they thought my Lord meant it *in terrorem*, *&c.* What if two of the truſtees had died, ſhould ſhe never have married? Surely you would have re- lieved her.

BALDWIN, *Serjeant.* Here is as full a conſent to the mar- riage, as could well be in this caſe. For ſince the plaintiff had no notice of the neceſſity of the earl's conſent before the mar- riage, it had been the ſtrangeſt and unexpectedeſt thing in the world, that ſhe could have gone about to have aſked it. The heir could not have taken notice of ſuch a forfeiture; and why ſhould a man that is named by way of remainder? In caſe of a perſonal legacy, this were a void proviſo by the civil law; for I have informed myſelf of it. * It is a maxim with them, "*Matri-* "*monium eſſe liberum.*" This amounts to as much as the condi- tion, that the perſon ſhould not marry at all. For when it is in the truſtees power, they may propoſe the unagreeableſt perſon in the world; it is a moſt unreaſonable power, and not to be favour- ed. *Sir Thomas Grimes* ſettled his land ſo, that his ſon ſhould pay portions; and if he did not, he demiſed the lands over; and it was adjudged relievable. If I limit, That my daughter ſhall marry

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1. Chan. Caſes, 89.

marry with the conſent of two, &c. if each of them have a deſign for a different friend, if you will not relieve, ſhe can never marry. Is it not more probable, That if the earl had lived he would rather have given her a maintenance, than have concluded her under perpetual misfortune and diſheriſon?

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KELYNGE, *Chief Juſtice.* I do not ſee how an averment or proof can be received to make out a man's intention againſt the words of the will. In *Vernon's Caſe (a)*, though it were a caſe of as much equity as could be, it was denied to be received; and ſo in my *Lord Cheney's Caſe (b)*. Here was a caſe of *Sir Thomas Hatton (c)*, ſomewhat like this caſe, wherein no relief could be had.

4. Co. 4. 5. Co. 68. Plow. 345.

VAUGHAN, *Chief Juſtice.* I wonder to hear of citing of precedents in matter of equity. For if there be equity in a caſe, that equity is an univerſal truth, and there can be no precedent in it. So that in any precedent that can be produced, if it be the ſame with this caſe, the reaſon and equity is the ſame in itſelf. And if the precedent be not the ſame caſe with this, it is not to be cited, being not to that purpoſe.

Co. Lit. 216.

BRIDGMAN, *Lord Keeper.* Certainly precedents are very neceſſary and uſeful to us, for in them we may find the reaſons of the equity to guide us; and beſides, the authority of thoſe who made them is much to be regarded. We ſhall ſuppoſe they did it upon great conſideration, and weighing of the matter; and it would be very ſtrange, and very ill, if we ſhould diſturb and ſet aſide what has been the courſe for a long ſeries of time and ages.

Thereupon it was ordered, that they ſhould be attended with precedents, and then, they ſaid, they would give their opinions.

* Three weeks after, they came into chancery again, and delivered their opinions *ſeriatim*, in this manner, *viz.* * [308]

HALE, *Chief Baron.* The general queſtion is, Whether this decree ſhall paſs? I ſhall divide what I have to ſay into theſe three queſtions or particulars: FIRST, I ſhall conſider, Whether this be a good *condition* or *limitation*, or *conditional limitation?* for ſo I had rather call it; it being a condition to determine the eſtate of the plaintiff, and a limitation to let in the defendant. I think it is good both in law and equity; and my reaſons are, firſt, becauſe it is a collateral condition to the land, and not againſt the nature of the eſtate, and ſhe is not thereby bound from marriage.

SECONDLY, It obliged her to no more than her duty: ſhe had no mother, and in caſe of marriage ſhe ought to make application to her grandmother, who was *in loco parentis*; and ſince the eſtate moved from the grandfather, ſhe was miſtreſs of the diſpoſition and manner of it. It is true, by the civil eccleſiaſtical law, regularly ſuch a condition were void; and therefore, if the queſtion were

(a) 4 Co. 1. Bendl. 210. 3. Leon. 28. Dyer, 317.

(b) 5. Co. 68. Moor, 727.

(c) Hatton v. Gray, 1. Eq. Abr. 23. 2. Chan. Caſes, 164.

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of a legacy, there might be a great deal of reaſon to queſtion the validity of it, becauſe in thoſe courts wherein legacies are properly handled, it would have been void. But this is a caſe of land (deviſe). Indeed, it is agreed, that this is a good condition, and not to be avoided in itſelf.

THIRDLY, This being a good condition and limitation over, the queſtion is, Whether there be relief againſt it in equity, admitting it were a wilful breach? I think there ought not to be any. I differ from the reaſons preſſed at the bar; as FIRST, That it was a deviſe by will, by virtue of the ſtatute, &c. But that doth not ſtick with me; for if there may not be a relief againſt a breach of a condition in a will, there would be a great ſhatter and confuſion in men's eſtates, and ſome of thoſe ſettled by great advice, and there have been precedents of relief in ſuch caſes: *Fitz. v. Seymour* (*a*), and *Salmon v. Bernard* (*b*). SECONDLY, It has been urged, there could be no relief, becauſe there is a limitation over. But that I ſhall not go upon neither. There have been many reliefs in ſuch caſes: I will decline the latitude of the objection, for that would go a great deal further than we are aware. But yet I think there ought to be no relief in this caſe. It is not like the caſe of payment
[309] * of money, becauſe there the party may be anſwered his debt with damages at another day; and ſo may be fully ſatisfied of all that is intended him. But here my FIRST REASON is, That it is a condition to contain the party in that due obedience which law and nature require. SECONDLY, It is a voluntary ſettlement to the grand-daughter in tail, and the remainder over is ſo too, and both theſe parties are *in æquali gradu* to the deviſor; and therefore they being both in a parity, it would be hard to take the eſtate from him to whom and in whoſe ſcale the law hath thrown the advantage. THIRDLY, It appears by the body of the will, that the earl did as really intend it ſhould go over, if ſhe married without conſent, as if ſhe died without iſſue; for they are both in the ſame clauſe. There may be as much reaſon to turn it into a fee-ſimple, in caſe ſhe had died without iſſue, as in this caſe; for ſo I doubt the penning of this decretal order does. And FOURTHLY, I reſt upon this, It is a caſe without a precedent. I remember after that *Lanyett's Caſe* (*c*) had been adjudged, that in the ſixth of *Charles the Firſt* there was a caſe, I ſuppoſe *Saunders v. Corniſh* (*d*), of a limitation in tail and a deviſe over, and it was adjudged void; and the Judges ſaid, "So far it is gone, and we will go no further, becauſe we do not know where it will reſt." I know there is no intrinſical difference in caſes by precedents, but there is a great difference in a caſe wherein a man is to make, and where a man ſees (and is to follow) a precedent: in the one caſe a man is more ſtrictly bound up, but in the other he may take a greater liberty and latitude. For if a man be in doubt, *in æquilibrio*, concerning a caſe, Whether it be equitable or no? in prudence he will determine according as

It was of a leaſe for years, and ſo was adjudged void. Cro. Car. 230.

(*a*) (*b*) 9. Co. 60. Cro. Jac. 304. (*c*) (*d*) Cro. Car. 230.

the

the precedents have been, eſpecially if they have been made by men of good authority for learning, &c. and have been continued and purſued. Here muſt be ſome boundary, or we ſhall go we know not whither. It were hard a court of equity ſhould do that which is not fit to be done in any court below a parliament. The precedents do not come home to the caſe. Moſt of them are in caſe of money legacies; and in ſome of thoſe caſes we may give allowance in reſpect of the law of another *forum* to which they belong. But this is in caſe of land only (*a*). Indeed he is no authority; but there is a very good exemplification of this matter. FRY AND HIS WIFE *againſt* PORTER.

* I ſhall conſider the allays and circumſtances which are obſerved, and offer to qualify this caſe and induce relief.—FIRST, It is ſaid, that this clauſe was only *in terrorem*, and ſome witneſſes have been examined to prove it: but I am not ſatisfied how collateral averments can be admitted in this caſe; for then, How can there be any certainty? A WILL will be anything, everything, nothing. The ſtatute appointed the will ſhould be in writing, to make a certainty; and ſhall we admit collateral averments and proofs, and make it utterly uncertain?—SECONDLY, It is ſaid in this caſe, the effect of the *proviſo* has been obtained; for the truſtees have now declared their conſent. I muſt ſay, it is not full, for they do not ſay they would have conſented; but that poſſibly ſuch reaſons might have been offered as they ſhould have done it; and poſſibly, I ſay, not. They, like good men, have only declined the ſhewing an ineffectual contradicting of a thing which is done, and cannot now be recalled, undone, or altered. Beſides, if there had been but a circumſtantial variation, the conſent afterwards might have been ſomewhat; but here it is in the very ſubſtance. In the caſe before cited at the bar by MR. SERJEANT ELLIS, where the conſent was to be had *in writing*, and it was had only *by parol*, there was great equity that it ſhould be relieved, becauſe it was only a provident circumſtance, and wiſdom of the deviſor, *viz.* for the more firm obliging the party to aſk conſent, which the deviſor conſidered might be pretended to be had by ſlight words, in ordinary and not ſolemn communication, or elſe in paſſion and heat (as in this caſe, when the plaintiff would not conſent to the approved marriage with the *Lord Morpeth*, the counteſs ſaid, "ſhe might marry where ſhe would:" which words imported a neglect of care for the future over the plaintiff, becauſe ſhe would not be ruled by the counteſs in accepting the tender of ſo commendable a marriage); as alſo for the benefit of the deviſee (in the caſe aforeſaid), that in caſe the deviſee did marry with the conſent of the truſtee, he might not after (through prejudice, &c.) avoid it by denial of ſuch conſent, and ſo defeat or perplex the deviſee for want of proof of ſuch his conſent.—THIRDLY, It is ſaid the party is an infant. Why, an infant is bound by a condition in fact, by law. It is true, we are now in equity; but in

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Cro. Jac. 145.

2. Vern. 561.

(*a*) 4. Co. 12.

equity,

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equity, ſince this refers to an act * which ſhe, though an infant, is capable of doing, *viz.* to marry; it were unreaſonable that ſhe ſhould be able to do the act, and not be obliged by equity to obſerve the conditions and terms which concern and relate to that act: ſo that it is all one, as if ſhe had been of full age. The ſtatute of *Merton*, *cap.* 5. provides, That uſury ſhall not run againſt infants; and yet the ſame ſtatute *cap.* 6. appoints, That if an infant marry without the licence of his lord, &c. he ſhall forfeit double the value of his marriage: and it is reaſonable, becauſe marriage is an act which he may do by law while he is under age.

Notice.

Vide ante, 86, 87, &c. 300, 301, &c. Poſt. 311.

As to the point of notice: FIRST, Whether notice be requiſite or no, in point of law, I will not determine. But I muſt needs ſay, that it muſt be referred to law. But, SECONDLY, If it be not requiſite in law, how far a court of equity might relieve for want of it, I will not now take upon me to determine. I will not trench upon matters *gratis*, of which I know not what will be the conſequence. But I conceive in this caſe, the fact is not yet ſettled, whether there were notice or not; and it were a hard matter, that becauſe no notice is here proved, it ſhould be taken for granted there was none. For here are ſeveral circumſtances that ſeem to ſhew there might be notice: and a public voice in the houſe, or an accidental intimation, &c. may poſſibly be ſufficient notice. I ſhall therefore leave it as a fit thing to be tried; and till that, the caſe in my underſtanding is not ripe; and therefore I will add no more. I think this decree ought to be altered if not ſet aſide. But as this caſe is, there ought to be no relief.

VAUGHAN, *Chief Juſtice.* I ſhall conclude as my lord chief baron did, That as this caſe is, there ought to be no relief. I will ſingle out this caſe from ſeveral things not material to it, as my lord chief baron did, &c. I think, if land be deviſed on condition to pay legacies, and that the deviſee has paid almoſt all, and fails in one, or ſo, there may be good cauſe of relief, becauſe he has paid much, and is ſomewhat in the nature of a purchaſor. This is not like a legacy; this is upon the ſtatute, where it is
* [312] ſaid, "a man may deviſe at *his will and pleaſure," *i. e.* abſolutely, upon condition, upon limitation, or any way that the law warrants. Suppoſe there had been a ſpecial act of parliament diſpoſing as the earl has done, in this caſe could there be any colour in equity to alter or vary this law? And here it is equally as concluding as that, ſince the ſtatute gives a man power to diſpoſe as expreſsly; and otherwiſe equity would alter and diſpoſe of all property, and all things that came in queſtion. But let notice or conſent, &c. be requiſite, or not, it is triable at law. But I ſtand upon this, that there ought to be no relief in equity. It was inſiſted, that her grandmother gave a kind of conſent: but I take that for nothing; for though the grandmother would not have offered or propoſed a marriage, yet ſhe ought not to marry without her conſent. Nor is the lord's *poſt* conſent any thing; for conſent cannot be had for things which cannot be otherwiſe; as a man

cannot

cannot be ſaid to conſent to his ſtature, or the colour of his hair, &c. A man may know of what opinion he is, or was; but it is impoſſible for a man to know of what opinion he would have been in the circumſtances of an action which he never tried. I conclude, the plaintiffs ought not to have relief in equity. But if any matter in law will help them, they are not excluded from it.

FRY AND HIS WIFE *againſt* PORTER.

KELYNGE, *Chief Juſtice.* I think there ought to be no relief in this caſe. I have conſidered it as well as I can, and I think nothing is more fit to be obſerved than chief cuſtomary rules for children; they are very good reſtraints for children, and ought to be made good here, to encourage obedience, and diſcourage thoſe who would make a prey of them; and if there were not hope for men to haſten their fortunes by this means, there would be few adventures of this nature. I have looked upon the precedents, &c. and I find they come not to this caſe, except only one, and that is but ſeven years old; and the others are for money, for which there is reaſon, becauſe the party may be ſubſtantially relieved and ſatisfied otherways. If there had been no limitation over, there may be ſome reaſon why it may be intended, that it is only *in terrorem*. I do not think all caſes upon wills are irremediable here (becauſe of the ſtatute). If the breach of the condition be in a circumſtance only, as in the caſe where the conſent was given, but not in writing, as it ought, it may be relieved; for that was a caution to the conſentor, that he ſhould not * give conſent before ſtrangers, and truſt to the ſwearing of a parol conſent. I never yet ſaw any deviſe obliging to have any ſuch conſent after the party's age of twenty-one years, ſo that there is no great hardſhip in it. And if there ſhould be any ill deſign in thoſe who have the truſt and power to conſent in withholding their conſent, it might be relieved here. I think none would make a decree, that if ſhe died without iſſue, the defendant ſhould have it; and this is the ſame: but equity can never go againſt the ſubſtantial part of a conveyance or will, but that muſt be governed by the party's agreement or appointment. Equity ought to ariſe upon ſome collateral or accidental emergent. It is not *in terrorem* indeed without a penalty. There can be no collateral averment. Being an infant is nothing: for this is only a proviſion while ſhe is an infant. Beſides, the caſe of the forfeiture of the double value is a very good inſtance for the notice. If ſhe had notice of this will, yet they that came to ſteal her knew it not: for they did not come to take a ſhorn ſheep, and therefore no relief is deſerved by the plaintiff. In honeſty and conſcience thoſe bonds ought to be kept ſtrict. I confeſs, I would not have the plaintiff tempted to a further ſuit; but indeed in ſaying that I go further than I need.

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BRIDGMAN, *Lord Keeper.* If I were of another opinion, yet I would be bound by my lords; for I did not ſend for them, not to be bound by them: but I was of their opinion from the beginning; and I am glad now that we are delivered from a common error, and that men may make ſuch proviſions as may bind their children. But to juſtify the decree a little: FIRST, Here are five thouſand

PRY AND HIS WIFE *againſt* PORTER.

thouſand pounds appointed to *George Porter*; ſo that ample proviſion was made him, and it may the rather be intended that this eſtate was wholly deſigned for the plaintiff.—SECONDLY, Here was a *poſt* conſent, and thoſe perſons were *in loco parentum*. Now if the earl had, as poſſibly he might have, thus pardoned and been reconciled to the marriage, he would probably have given the plaintiff the eſtate, and that is a reaſon to induce us to the ſame; for I think it clear, that an eſtate by act of parliament is liable to the ſame relief, regulation, &c. as any other eſtate. An eſtate-tail, though that be by ſtatute, yet is liable to be cut off, &c. If there had been a time limited, then there had been more reaſon to bind her up to have conſent. * But there ought to be a reſtraint put in theſe caſes. That of the double forfeiture was truly and well obſerved: where nobody is bound to give notice, it is to be taken by the party; but beſides, ſhe is not heir; for that might have made a great difference. This I thought not to ſay. Upon the whole I am of opinion with my lords, and I am glad I have their aſſiſtance. Let the bill be diſmiſſed,

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Ante, 86. 300, &c.
1. Lev. 48.
2. Lev. 21. 106. 153.
2. Jones, 179.
Cart. 170.
Vide Lutw. 56. 114. 135. 159. 249, 250.

See the caſe of Scott v. Tyler, 2. Brown's Chan. Caſes, page 431. and the caſes there cited, where it was determined, upon full argument, that *a condition* annexed to a legacy, "that "the legatee ſhall not marry without "the conſent of her mother," is a valid condition; and that upon her marriage without ſuch conſent it ſhall go to the mother under a gift of a general reſidue. See alſo Ambler's Rep. 256. 259. Comyns Rep. 748. 2. Vern. 372. 1. Brown, C. C. 303.

A TABLE

A

TABLE

OF THE

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12. In an *aſſumpſit* on a promiſe that the plaintiff ſhall enjoy certain premiſes *ſine interruptione alicujus*, it is not material whether the diſturbance be by *title* or by *tort*; for a quiet poſſeſſion ſhall be intended the chief cauſe of the contract, *Norman v. Foſter*, 101

13. An *aſſumpſit* cannot be maintained againſt an executor for the arrears of an *annuity*, for there is no perſonal privity, *Anonymous*, 163

14. An *aſſumpſit* will lie on a promiſe made by *A.* to pay a debt due from *B.* to *C.* in conſideration that *C.* bring two witneſſes to prove it on oath before a juſtice of the peace to be a true debt, *Amie v. Andrews*, 166

15. An *aſſumpſit* on a promiſe to pay ſo much *when he received money*, &c. ought to aver *how much* the defendant received, and from *whom*, and *when*, and *where* received; but on the general iſſue pleaded, theſe defects are aided by the verdict, *Anonymous*, 169

16. To an *aſſumpſit* containing the counts of *quantum meruit*, and an *indebitatus*, the defendant may plead *infimul computaſſent*, and that the plaintiff, in conſideration of paying the balance, promiſed to give the defendant a diſcharge of all demands, *Milward v. Ingram*, 205, 206

17. To *aſſumpſit* on a promiſe to deliver a horſe *upon requeſt*, the defendant may plead that the plaintiff abſolved him from the promiſe *before requeſt* made, *Edwards v. Weeks*, 262

18. An *aſſumpſit* upon an *account ſtated*, muſt be brought within ſix years after the cauſe of action ariſes, *Farrington v. Lee*, 269

19. If one of two executors receive the whole of the teſtator's effects, and the other ſue for a recovery of his moiety, an *aſſumpſit* on a promiſe to pay him ſo much in conſideration that he will forbear his ſuit, and *ſhew an account*, is good after verdict, although it be not ſtated in what court the ſuit was commenced, *Smith v. Smith*, 284

20. An *indebitatus aſſumpſit* will not lie by an *indorſee* againſt the *acceptor* of a bill of exchange, *Brown v. Lewin*, 285

21. An *aſſumpſit* on a *quantum meruit* for "one pair of gloves," and "a parcel of thread," is ſufficiently certain, *Jeny v. Norrice*, 295

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1. An attachment lies for non-performance of an award after the ſubmiſſion has been made a rule of court, *Derbyſhire v. Cannon*, 21

2. A defendant coming in on an attachment for non-performance of an award may plead "no award made," *ibid.* 21

3. An attachment lies againſt commiſſioners of ſewers for impoſing a fine after *certiorari* delivered, *Smith's Caſe*, 44

4. An attachment lies againſt a ſheriff's officer for arreſting a man on *Sunday*, 56

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2. An *attorney* may be indicted for *extortion*, on the ſtatute of 3. Jac. 1. c. 7. *Terry's Caſe*, 5

3. And though the party grieved do not ſue, yet the king may proceed to ſtrike the attorney off THE ROLL, 6

4. An attorney ſued by bill cannot be arreſted; therefore, although he be about to leave the kingdom, the court will not oblige him to find ſpecial bail, *Redman's Caſe*, 10

5. An attorney ſworn and admitted into any of the *ſuperior courts*, may practiſe in any *inferior court*, unleſs ſuch court be reſtrained, by charter or preſcription, to a certain number, in excluſion of others, *Haſting's Caſe*, 23

6. An attorney cannot be choſen conſtable, *Poordage's Caſe*, 22

7. If an attorney diſcontinue an action after having pleaded it as depending, or aſſign infancy for error when the party is of age, he ſhall be ſtruck off THE ROLL, *Aſton's Caſe*, 41

8. An attorney cannot ſue in an inferior court for coſts of buſineſs done in the court of king's bench, *Hillyard's Caſe*, 118

9. If an attorney, on the retainer of a client, ſue for a debt which he knows to be releaſed, yet an action will not lie againſt him; for he does it only as ſervant to another, in the way of his profeſſion, 210

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2. But if an *audita querela* be brought after the *day in bank*, and the judgment be not entered up, the party ſhall be ordered to enter it as of that day, to prevent the plea of *nul tiel record*, *ibid.* 111

3. If two joint and ſeveral obligors are outlawed, and one of them, being taken on the *capias utlagatum*, is ſuffered to eſcape, and the party recover the original debt, in an action of debt on the eſcape; the other obligor, on being taken, may bring an *audita querela*; but he muſt ſhew *the time* when, and *the place* where ſatisfaction was made, *Alfred v. Tatnal*, 170

4. If one of two obligors be ſued to outlawry, and afterwards judgment and execution is had againſt the other obligor, the outlaw cannot be relieved by *audita querela*, *Higden v. Whitchurch*, 224

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2. The ancient form of taking bail, and declaring in civil actions, *Anonymous*, 16

3. The mode of taking bail, as now ſettled by rules, Trinity 22 Car. 2. and Eaſter 5. Geo. 2. *ibid.* 16. *notis*

5. *Assumpsit* on a promise to carry two *cart-loads*, &c. is sufficiently certain, *Vere v. Reyner*, 19

6. An infant may maintain an *assumpsit* on a contract for his benefit, although he cannot be sued upon it, *Smith v. Bowin*, 25

7. In *assumpsit* in an inferior court, on a promise to pay on request, the *place* of request must be stated, and alledged to be *within the jurisdiction* of the court, *Healy v. Warde*, 32

8. In *assumpsit* for money had and received by the defendant for the plaintiff, *to the use of the defendant*. court, after verdict, will reject t' ter words as surplusage, *Nosu Wyldeman*,

9. *Assumpsit* on a promise to ... appear of another in consider... to hold plaintiff *mitteret prosequ... v. Booth*, 236 certain, *Buckley v. T...*

10. To an *assumpsit* ... upon a supposi- so much out of th... fendant flies the judg- the defendant ... 236 Limitations.

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3. A creditor may set off his debt against his bankrupt debtor, and pay over or prove the balance, *Anonymous*, 215

4. By 5. Geo. 2. c. 30. commissioners of bankrupt, when there has been *mutual credit* and *mutual debts* between the bankrupt and any other person, may allow the balance to be proved or paid, &c. 215 *notis*

5. A debtor to a bankrupt may plead a set-off, in an action brought against him by the assignees, 215 *notis*

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1. A bargain and sale to a daughter, in ... neral issue pleaded ... aided by the ver...

16. To an *assu...* of *quantum* ... the defen... *tassent*, ... siders... mis... of ... ade, though with- consideration, by ...e and grant," with ... of a *pepper-corn*, for the receiving a release of the ...nce; the consideration of the ...r-corn is good to raise *a use* in the ...rantee, and make the lands pass by way of bargain and sale, *Barker v. Keate*, 262, 263

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2. An order of maintenance to pay so much a week "till the child is twelve years old," is bad, *Rex v. Burrell*, 21

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indebitatus aſſumpſit will not lie by an indorſee againſt the acceptor of a bill of exchange, *Brown v. London*, 285

5. Neither *debt* nor *indebitatus aſſumpſit* will lie on a bill of exchange, except when there is a privity between the parties; as between the payee and the drawer, and the drawer and acceptor; or between the indorſee and his immediate indorſer, 286 *notis*

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2. To debt on bond the defendant cannot plead another bond given in ſatisfaction; but if the plaintiff take iſſue on ſuch plea, and it is found againſt him, the defendant ſhall have judgment, *Blythe v. Hill*, 221

3. To debt on bond againſt *the heir* of the obligor, the defendant may plead another bond given in ſatisfaction by *the adminiſtrator* of the obligor, *ibid.* 225

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CARRIER.

Hoymen, ferrymen, and maſters of ſhips, who carry goods for hire, are *common carriers*, and are liable to the owner for the amount if loſt, deſtroyed, or ſtolen, while under their care, *Mors v. Sluce*, 85

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1. The king is entitled to *a certiorari* as a matter of right, but if a ſubject apply for it, it is diſcretionary in the court to grant or refuſe it, according to the circumſtances of the caſe, *Lampriere's Caſe*, 41

2. A *certiorari* granted *de bene eſſe*, to remove an indictment when found, *ibid.* 41

3. The delivery of a writ of *certiorari* is a *ſuperſedeas* of the proceedings, *Smith's Caſe*, 44

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1. The 12. Car. 2. c. 12. does not extend to a benefice without the cure of ſouls, *Clerke v. Heath*, 12

4. Whoever is admitted, inſtituted, and inducted into any eccleſiaſtical benefice, ſhall, *ipſo facto*, have the cure of ſouls, *Clerke v. Heath*, 12

5. A *parſon* and *vicar* may have a concurrent cure of ſouls in the ſame church, for it may have two patrons, each having an undivided moiety, *ibid.*

4. The ſpiritual court may, by excommunication, compel pariſhioners to repair the church; and, when *a veſtry* have made a rate for that purpoſe, may enforce the payment of it, *Rogers v. Davenant*, 194. 237

5. If a church and chancel be out of repair, the pariſhioners are only chargeable to repair *the church*, *ibid.* 237

6. If a church be down, the major part of the pariſhioners may raiſe a tax, not only *to rebuild*, but, if neceſſary from the increaſe of the pariſh, *to enlarge* it, 237

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2. In an action of account againſt preceding churchwardens, the property muſt be ſtated to be *bona parochianorum*, *ibid.* 65

3. Churchwardens cannot make a rate without ſummoning the pariſhioners; but if the pariſhioners will not attend, the churchwardens themſelves may make it, *Anonymous*, 79

4. Churchwardens cannot without the aſſent of the pariſhioners aſſeſs a tax for the repair of the church, *Rogers v. Davenant*, 194

5. Churchwardens muſt ſummon the pariſhioners to a veſtry; and this need not be from houſe to houſe; but a general public ſummons at the church is ſufficient, *ibid.* 237

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A citation *ex officio* is contrary to law, 185

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1. If a ſtatute direct a commitment by *two juſtices*, a commitment by *one juſtice* only, is illegal, *Franklyn's Caſe*, 68

2. The court of aldermen may commit for non-payment of a fine impoſed for marrying a city orphan without their conſent, *Harwood's Caſe*, 77. 79

3. A commitment by the houſe of lords for *a contempt* is good, although the warrant do not expreſs *the nature* of the contempt, nor *the place* where it was committed, nor *the time* when it was committed, nor whether it was on *a conviction*, or on *an accuſation* only, *Lord Shafteſbury's Caſe*, 144

COMMON.

A corporation may preſcribe for a common without ſtint, without ſaying *levant et couchant*, *Miller v. Staples*, 6, 7

CONDITION.

1. A condition in a bond, that the obligor ſhall procure *a releaſe* for two *ſeveral* legacies from *two infants* when they ſhall come to their ages of twenty-one years, ſhall be taken when they *reſpectively* attain their ages of twenty-one; and as the legacies are ſeveral, they muſt give ſeveral releaſes, *Boſwel v. Coats*, 33

2. If *A.* covenant that he will not uſe ſuch a trade, and in conſideration of performance thereof *B.* covenants to pay *A.* an annuity; this is not a *condition precedent*, but a *negative covenant*, *Humlock v. Blacklow*, 64

3. On a condition to execute a deed to the ſatisfaction of the plaintiff's counſel, the defendant, to ſave the condition, muſt tender the deed, *Baker v. Bulſtrode*, 104

4. If a man make a feoffment in fee upon condition *generally*, that the feoffee ſhall not alien, the condition is void, 141

5. A condition "If *A.* within ſix months after the death of *B.* ſhall aſſure *an annuity*

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6. If one part of a condition be rendered impoſſible by the act of God, yet the obligor is bound to perform the other part, 266

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1. The *Seſſions*, on default of *the Leet*, may appoint conſtables in particular pariſhes, although no conſtables had been before appointed, *Conſtable of Homsby's Caſe*, 13

2. Members of Parliament and their ſervants are exempted from being conſtables, *ibid.*

3. The court will not quaſh an order of ſeſſions appointing a conſtable, if the matter be doubtful, *ibid.*

4. A *phyſician* is not exempted by the common-law from ſerving the office of conſtable, *Dr. Poordage's Caſe*, 22

5. But by 32. Hen. 8. c. 40. members of the college of phyſicians are exempted from ſerving the office in London, *ibid. notis*

6. Attornies and barriſters, while practiſing in the courts, are exempted, *ibid.*

7. A preſentment for refuſing to be ſworn conſtable, muſt ſtate before whom the ſeſſion was held, *Rex v. Vaws*, 24

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If *A.* be tenant for life; remainder to *B.* for life; remainder to *C.* for life; remainder to *a contingent*, and *A.* and *B.* join in a fine; *C.'s right of entry* preſerves the contingent eſtate, *Zouch v. Clare*, 92

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To meet tumultuouſly at a conventicle, is a breach of the peace, 13

CONUSANCE.

The chancellor of the univerſities of *Oxford* or *Cambridge* ſhall be allowed *conuſance* of an action brought in the ſuperior court againſt the preſident and ſcholars of a college for goods ſold and delivered to their uſe, *Magdalen College Caſe*, 164

COPY.

1. When a deed is proved to be burned, *a copy* is good evidence, though not examined with the original, if it be underſtood to be a true copy, *Medlicot v. Joyner*, 4

2. The copy of a deed cannot be given in evidence, unleſs proved to have been compared with the original, although delivered by counſel to a purchaſer as a true copy, *Peterboro' v. Mordaunt*, 94

3. In debt on a bond and "covenant performed" pleaded, the court, on proof that the original deed is in the hands of the plaintiff, will allow the defendant to give a copy of it in evidence, *Anonymous*, 266, 267

COPYHOLD.

1. By a demiſe of "all my copyhold eſtate," the whole intereſt paſſes, *Wilſon v. Robinſon*, 101

2. In copyholds, the admittance of the particular tenant, is the admittance of all the remainder-men, for every purpoſe except the lord's fine, *Blackburn v. Graves*, 102. 120

3. If a ſurrender be made to the uſe of a man and his heirs of copyhold land, deſcendible according to the cuſtom of *Borough-Engliſh*, and the ſurrenderor die before admittance, the right will deſcend according to the cuſtom, *Blackburn v. Graves*, 102

4. If a man ſurrender a copyhold, the ſurrenderee hath no eſtate in him, but it remains in the ſurrenderor till admittance, 120

5. If a ſurrender be to *J. S.* and his heirs, the heir, on the death of his anceſtor, is in without admittance, 120

6. If a copyholder in remainder enter upon the tenant for life, he is a diſſeiſor, and his ſurrender of the eſtate is void, *Kear v. Kirby*, 199, 200

7. A recovery in court-baron ſuffered by a copyholder for life, as tenant of the fee, is not a forfeiture of his eſtate, *ibid.* 200

8. If a copyholder for life commit a forfeiture, *the lord*, and not *the remainderman*, muſt take advantage of it, *ibid.* 200

9. If a copyhold tenant for life ſurrender, no uſe is left in *him*, and therefore whoever is afterwards admitted, comes in under *the lord*: but this is to be underſtood only of copyholds that are cuſtomary eſtates for life, and not of copyholds granted for life, with remainder in fee, 209

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2. A corporation cannot delegate a power to ſeize for a forfeiture, or enter for condition broken, except by *deed* under the common ſeal, *Horne v. Ivy*, 18

3. To ſay of *a corporation*, "Whenever a burgeſs of it puts on his gown, Satan enters into him," is an indictable offence, *Rex v. Baker*, 35

4. The goods and debts of a corporation are liable to the cuſtom of foreign attachment, 212

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1. The court of chancery may relieve a defendant againſt a judgment at law, and order the plaintiff to pay coſts, *Rex v. Standiſh*, 59

2. An executor who brings a writ of error on a judgment obtained againſt his teſtator, is not liable to *coſts*, though the judgment be affirmed, *Legg v. Richards*, 77

3. But executors are liable to coſts in error, where they would be liable in the original action, 13 *notis*

COTTAGE.

An indictment for erecting a cottage *contra formam ſtatuti* quaſhed becauſe it did not ſtate that the cottage was inhabited, 295

COVENANT.

1. If *A.* covenant with *B.* to aſſign over his trade to him, and that he will not endeavour to take away any of his cuſtomers; and *B.* in conſideration of the performance of theſe covenants, covenant on his part to pay *A.* an annuity for life; this is a negative covenant, and not a condition precedent, *Humlock v. Blacklow*, 64

2. In covenant on a warranty againſt all perſons, a breach aſſigned that *A.* having lawful title, entered, &c. without ſhewing *what his title was*, is erroneous, *Wootton v. Heal*, 66, 67. 292

3. On a covenant to convey all lands in *Dale*, in the poſſeſſion of *A.* the covenantor is not bound to execute a conveyance of the lands in the poſſeſſion of *A.* and all other lands in *Dale*, *Laſſels v. Catterton*, 67

4. On

4. On a covenant to pay twenty pounds on ſuch a day, and in default thereof to pay forty pounds, a demand is not neceſſary to ſupport an action for the penalty, *Bradcat v. Tower*, 89

5. On a covenant for quiet enjoyment, a breach that a ſtranger entered *claiming title*, without ſhewing *the kind of title* under which he claimed, is bad, *Norman v. Foſter*, 101

6. On a covenant to ſave the covenantee harmleſs againſt all lawful and unlawful titles, it muſt be ſtated, in aſſigning a breach, that the perſon who entered did not claim under the covenantee, *ibid.* 101

7. If a man covenant that he has a lawful right to grant, and that the covenantee ſhall enjoy, notwithſtanding any perſon claiming under the covenantor, theſe are two ſeveral covenants, and the firſt, being general, is not reſtrained by the ſecond, *ibid.* 101

8. If *A.* "aſſign and transfer" to *B.* all the money that *ſhall be* allowed in lieu of his ſhare in a ſhip; *B.* may maintain an action againſt *A.* on the *implied covenant* ariſing from the words "aſſign and transfer," notwithſtanding the ſubject of the covenant is *a choſe in action*, *Deering v. Farrington*, 113

9. The word "demiſe" raiſes an implied covenant, 113

10. *A.* grants a rent-charge to *B.* for the life of *C. habendum* to *B.* his heirs and aſſigns, to the uſe of *C.* with a covenant in the indenture to pay it to the uſe of *C.* If the rent be not paid *to B.* to the *uſe of C.* an action of covenant may be maintained by *B.* againſt *A.*; for though the rent-charge is executed in *C.* by the 27. Hen. 8. c. 10. yet the covenant being collateral, remains undiſcharged with *B. Baſcawen and Herle v. Cook*, 223

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2. In debt on bond, conditioned to pay forty pounds a-year ſo long as *A.* ſhould continue regiſter; the defendant pleads, that the office was for the life of *B.* and *C.* and that he continued regiſter during their lives, and paid the annuity; and the plaintiff replies, that defendant continued in the office longer, and did not pay; if the defendant take iſſue on the non-payment of the money, it is a *departure* from his plea in bar, *Gayle v. Betts*, 227

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5. If an eſtate limited to a man and the heirs of the body of his father *veſt* in him, be it either by *diſcent* or *purchaſe*, and he die without iſſue, it ſhall go to his brother, 238

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6. If a man deviſe "all his copyhold eſtate," his whole intereſt therein will paſs, *ibid.* 101

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8. A deviſe of "all my eſtate, paying debts and legacies," will paſs all the teſtator's real eſtate, *ibid.* 101

9. If a man deviſe *Blackacre* to *A.* and the heirs of his body, *and alſo*, "I deviſe *Whiteacre* to the ſaid *A.*;" the deviſee hath only an eſtate for life in *Whiteacre*, 101

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2. The parſon of a *donative* cannot marry perſons without a licenſe, *Maddox v. Peterborough*, 22

3. The ſpiritual court may cite the miniſter of a *donative* to take a faculty for preaching from the biſhop, *Allane v. Exton*, 90

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3. A *chapter*, although it hath no *dean* is within the 13. Eliz. c. 10, which is a *general law*; and therefore if ſuch chaplain grant a *next avoidance*, it is void *ab initio*, *Southwell v. Lincoln*, 204

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5. *A.* having two ſons, *C.* and *D.* covenants to ſtand ſeiſed to the uſe of *C.* in tail male ſpecial, and for want of ſuch iſſue to the heirs male of his own body, and for want of ſuch iſſue to his own right heirs for ever; if *C.* dies, leaving iſſue a ſon *E.* and a daughter *F.* and then *A.* dies, and then *E.* dies without iſſue; the eſtate veſted in *E.* as a purchaſer, and after his death it *deſcends* to his uncle *D.* as heir male

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2. In debt on bond for payment of a legacy, the defendant is eſtopped from ſaying the teſtator revoked the will, *Backwell v. Barduc*, 113

3. If, to a faulty declaration, the defendant plead in bar, and the plaintiff take iſſue, a verdict for the defendant *eſtops* the plaintiff from bringing a ſecond action for the ſame cauſe, 207

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2. A verdict in one ejectment cannot be given in evidence on the trial of another ejectment for the ſame premiſes, *Clerk v. Rowel*, 10

3. In an action for a *tort*, thoſe againſt whom there is no proof may be acquitted, and give evidence for the defendant, *Anonymous*, 11

4. A deed under ſeal, when properly proved, may be read in evidence, though the ſeal be broken off, *Clerke v. Heath*, 11

5. What ſhall be evidence of epiſcopal ordination, *ibid.*

6. On a *ſcire facias* to avoid a patent office, a perſon who is to be deputy to the plaintiff in caſe the patent is repealed, may be examined as a witneſs, *Hanning's Caſe*, 21

7. In debt for rent, on *nil debet* pleaded, evidence may be given of a ſuſpenſion of the rent, *Anonymous*, 35

8. A ſheriff may give the ſtatute of 23. Hen. 6. c. 10. in evidence on the general iſſue; for it is a *public act* of which the court will take notice without its being pleaded, *Parker v. Welby*, 58 *notis*

9. A perſon *ſubpœnaed* to give evidence is protected from arreſt *eundo et redeundo*, *Anonymous*, 66

10. Formerly poor inhabitants, though they paid no taxes, could not give evidence in actions againſt the hundred on the ſtatutes of HUE AND CRY; but now, by 8 Geo. 2. c. 26. they may give teſtimony in the ſame manner as if they were not inhabitants, *Barrat v. Steak*, 74

11. The copy of a deed cannot be given in evidence unleſs proved to have been compared with the original, although delivered by counſel to a purchaſer as a true copy, *Peterborough v. Mordaunt*, 94

12. An executor, who is not reſiduary legatee, may be examined as a witneſs in a ſuit concerning the eſtate of his teſtator, *Anonymous*, 107

13. On *not guilty* pleaded to an indictment for not repairing a road, the defendant cannot give in evidence that others are bound to repair it, *Rex v. St. Andrew's*, 112, 113

14. The teſtimony of witneſſes cannot be *perpetuated* by an examination at common-law, 114

15. An iſſue whether a party be tenant for life, is not proved by a deed ſhewing him tenant for life with a reverſion in fee, 115

16. In an action againſt a gaoler for an eſcape, the defendant, on *nil debet* pleaded, might, before 8. and 9. Will. 3. c. 27. ſ. 6. have given *freſh ſuit* in evidence, *Moſedell's Caſe*, 116

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18. A written inſtrument, though in the form of a *deed*, yet if in ſubſtance it is a *will*, may be given in evidence as a *will*, *Green v. Proude*, 117

19. An exemplification from the court-rolls of a manor of a recovery of lands in *ancient demeſne*, ſhall be received in evidence if the original record be loſt or deſtroyed, *Green v. Proude*, 117

20. In

20. In debt for rent, "*entry and ſuſpenſion*" may be given in evidence on the general iſſue *nil debet*, *Brown's Caſe*, 118

21. Recovery of damages for diſturbance of office is ſufficient evidence of *ſeiſin* in an aſſiſe againſt the *ſame* defendant, *Craig v. Norfolk*, 122

22. To maintain an *aſſiſe* for a patent office the party muſt prove a *ſeiſin in law*, *ibid.* 122

23. An executor who is bound in a joint and ſeveral bond with his teſtator, may give payment of it in evidence under *plene adminiſtravit*, *Rogers v. Danvers*, 166

24. In an action againſt a perſon as executor he may, on *plene adminiſtravit* pleaded, give in evidence that he was adminiſtrator *durante minore ætate*, and that he had paid debts to ſuch an amount, and delivered over the reſidue of effects to the executor, *Brooking v. Jennings*, 174

25. On a *ſpecial promiſe* the defence muſt be pleaded, but on an *implied promiſe* it may be given in evidence on the general iſſue, *Fitz v. Freeſtone*, 210

26. If the grant of an advowſon be pleaded with a *profert* of the deed, the court, on *oyer*, will not admit a copy, although the original is in the hands of the other party, *Anonymous*, 266

27. In an action of debt upon bond to perform covenants, the courts, on "covenants performed" pleaded, and proof that the original is in the hands of the plaintiff, will allow the defendant to give a copy of it in evidence, *Anonymous*, 266, 267

28. To treſpaſs for taking money the defendant ſhall not be permitted to give in evidence that the taking was felonious; but if it appear in evidence on the part of the plaintiff, he ſhall be nonſuited, *Lutterel v. Reynell*, 282, 283

29. In treſpaſs, if the taking appear to have been felonious, yet a perſon, though proved by his own teſtimony to be a *particeps criminis*, is a competent witneſs, *ibid.* 283

30. *A.* wins money of *B.* by means of *C.* and *D.* packing the cards; upon an indictment againſt *C.* and *D.* *A.* cannot be a witneſs, becauſe intereſted in the conviction; for he might give the record of it in evidence on a proſecution againſt him as a *particeps criminis*, 283, 284

31. *Hearſay*, though not direct evidence, is admiſſible in corroboration of a witneſs's teſtimony, *ibid.* 284

32. Depoſitions in chancery may be read in evidence on a trial at law, if the deponent is diſabled by ſickneſs to attend, *ibid.* 284

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1. A perſon excommunicated and brought into the king's bench upon an *excommunicato capiendo* has no day in court, and therefore cannot plead *miſnomer* in the writ, *Bonnefield's Caſe*, 70

2. The ſpiritual court may *excommunicate* all the pariſhioners for neglecting to repair the pariſh-church, and *abſolve* them individually as they are willing to contribute, until a majority have agreed to aſſeſs the tax, *Rogers v. Davenant*, 194. 236

EXECUTION.

1. Execution cannot be taken out by an adminiſtrator on a judgment in *trover*, obtained by him for the goods of the inteſtate, if the letters of adminiſtration be revoked, although the *converſion* was in his own time, *Turner v. Davies*, 62

2. In an action where part goes by *default* and part is *traverſed*, execution cannot be taken out till the traverſe be tried, *Rex. v. Eaſt Grinſtead*, 66

3. If a defendant die after execution awarded, and before it is ſerved, yet the *teſte* of the writ binds the goods in

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4. If two actions be brought againſt the heir on two ſeveral bonds by his anceſtor, the plaintiff who firſt ſigns judgment ſhall have priority of execution, although his action was not firſt commenced, *Anonymous*, 253

5. By 29. Car. 2. c. 3. no *fieri facias*, or other writ of execution, ſhall bind the property of goods, but from the time that ſuch writ ſhall be delivered to the ſheriff, 253

EXECUTORS.

1. An executor to whom the teſtator was indebted, cannot ſet off his debt on a *ſcire facias* to continue ſuit, on the teſtator's dying between verdict and judgment, *Burnel v. Holden*, 6

2. If there be ſeveral executors, they may all ſue *jointly* by *attorney*, though ſome of them are *infants* under ſeventeen years of age; but if ſuch executors be ſued, the *infants* muſt defend by *guardian*, *Foxwiſt v. Tremain*, 47. 72. 296

3. In debt againſt an executor, a plea of judgment recovered and no aſſets *ultra*, without alledging in *what court* and *the time* when recovered, is bad on a general demurrer, *Jordan v. Fawcett*, 50

4. An executor who brings a writ of error on a judgment obtained againſt his teſtator, ſhall not pay *coſts*, though the judgment be affirmed, *Legg v. Richards*, 77

5. But executors are liable to coſts in error where they would be liable to them in the original action, 77 *notis*

6. An executor may be examined as a witneſs in an action concerning the eſtate of his teſtator, if he be not the reſiduary legatee, *Anonymous*, 107

7. If an executor give a legatee a bond for the payment of his legacy, he cannot plead to an action on it, that the teſtator revoked the will, *Backwell v. Barden*, 113

8. An executor is not liable in *aſſumpſit* for the arrears of an annuity, *Sed Qu.* 163

9. In an action againſt an executor for a debt due from the teſtator out of a particular fund, it muſt be averred that the fund was ſolvent, 163

10. An executor who is bound in a *joint and ſeveral* bond with his teſtator, may plead the bond and no aſſets *ultra*, or may give payment of it in evidence under the plea of *plene adminiſtravit*, *Rogers v. Danvers*, 165, 166.

11. To an action againſt a perſon as executor, he may plead *plene adminiſtravit*, and give in evidence, that he was adminiſtrator *durante minore ætate*, and hath paid debts to ſuch an amount, and delivered over the reſidue to the rightful executor, *Brooking v. Jennings*, 174

12. An executorſhip *durante minore ætate* ceaſes on the infant's attaining ſeventeen years of age, *ibid.* 175

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15. An executor may bring debt on a leaſe for rent in the *debet et detinet* againſt the adminiſtrator *de bonis non* of the under-tenant of the term, for rent incurred in his own time, *Prattle v. King*, 185

16. An executor cannot waive a term, 186

17. A defendant executor muſt ſhew that he is rightful executor, to entitle him to retain a debt due to his wife; for otherwiſe he ſhall be intended executor *de ſon tort*, *Prince v. Rowſon*, 208

18. If a perſon who is named in a will as executor, poſſeſs himſelf of the goods of the teſtator, pay debts, and convert the reſidue, and then refuſe to take out a probate of the will, an adminiſtration granted to the widow on this refuſal is void; for *he* continues executor *de ſon tort*, and ſhall be liable to

to the creditors of the deceaſed, *Purton and Baſeden's Caſe*, 213

19. In debt againſt *A.* as *executor* of *B.* if he plead that he is *adminiſtrator* and not *executor*, he muſt expreſly ſhew that *B.* died inteſtate, and the time when the adminiſtration was granted, and conclude in *abatement* and not in *bar*, *Juſtice v. Whyte*, 239

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EXTINGUISHMENT.

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EXTORTION.

1. An *information* for extortion will lie againſt an attorney; notwithſtanding the 3. Jac. 1. c. 7. enacts, That if an attorney delay his client's ſuit or demand more than is due, the party grieved ſhall have an *action*, *Troy's Caſe*, 5

2. But the extortion muſt be ſpecially alledged, *ibid.*

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FALSE IMPRISONMENT.

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2. An action for falſe impriſonment will not lie againſt a magiſtrate for impriſonment, in conſequence of acts done by him in the character of a Judge, *Buſhell's Caſe*, 119

3. Same point, *Hamond v. Howel*, 184

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1. If a man cut corn and lay it by, and carry it away afterward, it is felony; but not if he cut it, and carry it away by one and the ſame act, *Emmerſon v. Anniſon*, 89

2. If a man be ſeiſed in right of his wife, and the wife be attainted of felony, the lord may enter and ouſt the huſband, *Parſons v. Perus*, 91

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FINE.

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2. A fine and non-claim will not bar the entry of the feoffor, on condition broken, although the feoffee was diſſeiſed, 4

3. An *entry* to deliver a declaration in ejectment is not ſufficient to avoid a *fine*; for there muſt be *an actual entry* for this purpoſe, *Clerke v. Rowell*, 10

4. If a fine be levied of lands in the vill of *A.* and the party have lands alſo in *B.* yet if both places have only one conſtable, all the lands ſhall paſs; for in ſuch caſe, both places conſtitute the ſame vill, *Waldron v. Roſcarriott*, 78

5. If *A.* be tenant for life; remainder to *B.* for life; remainder to *C.* for life; remainder to a contingent; and *A.* and *B.* join in a *fine*; *C's right of entry* will preſerve the contingent eſtate, *Touch v. Clare*, 92

6. If tenant in tail accept a fine, *tome cee*, &c. this doth not alter his eſtate; but if tenant for life accept of a fine, *ſur conuſance*

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4. If two actions be brought againſt the heir on two ſeveral bonds by his anceſtor, the plaintiff who firſt ſigns judgment ſhall have priority of execution although his action was not firſt commenced, *Anonymous*,

5. By 29. Car. 2. c. 3. no *fieri* other writ of execution, ſhall bind the property of goods, but from the time that ſuch writ ſhall be delivered to the ſheriff,

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FISHERY.

1. The right of fiſhing in the ſea, and the arms thereof, is common to all the king's ſubjects, *Fitzwalter's Caſe*, 105, 106

2. In the caſe of a private river, the lord having the ſoil is evidence to prove that he has the right of fiſhing, 105, 106
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3. In a claim of a free fiſhery, of a ſeveral fiſhery, or of a common of fiſhery, the party claiming muſt ſhew his right; for *prima facie* it is in all the king's ſubjects, or in the owner of the ſoil, 106
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FORFEITURE.

1. A man ſettles a term *in truſt* for himſelf during his life, and afterwards in truſt for ſeveral of his friends; PROVIDED, that if he have any iſſue of his body at the time of his death, the truſt ſhall ceaſe, and the aſſignment be to the uſe of ſuch iſſue; PROVIDED ALSO, that if he be minded to change the uſes, he ſhall have *power* ſo to do by writing in the preſence of two or more witneſſes, or by his laſt will. He afterwards commits high-treaſon; is *attainted* by act of parliament; and dies, leaving iſſue male; but without revoking the uſes of the ſettlement. This truſt term is forfeited during his life only, *Smith v. Wheeler*, 16, 17. 38. 40.

2. The king cannot create a forfeiture by letters patent, *Horn v. Ivy*, 18

3. A fine *ſur conuſance* levied by a tenant for life, is a forfeiture of his eſtate for life, *Green v. Proude*, 117

FORMA PAUPERIS.

See Pauper.

FORMEDON.

1. On *non-tenure* pleaded for 100 acres, to a *formedon in remainder* for 140 acres lying in three vills; the tenant need not ſet forth in which of the vills the 100 acres lie; but he muſt ſtate who was tenant on the day of ſuing out the original writ, *Fowle v. Doble*, 181

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FRAUDULENT CONVEYANCE.

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2. A conveyance by an adminiſtrator to the niece of the inteſtate, for a debt due to her by the inteſtate, is fraudulent as againſt creditors, unleſs it be proved that the adminiſtrator had aſſets at the time in his hands, *Bateman's Caſe*, 76

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GAVELKIND.

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GRANT.

1. The words "give and grant" enure ſometimes as *a grant*, ſometimes as *a covenant*, ſometimes as *a releaſe*; and muſt be taken in that ſenſe which will beſt ſupport the intent of the party, *Scudamore v. Croſſing*, 178

2. THE KING, being ſeiſed of *a manor* with an *advowſon* appendant, which manor and advowſon were formerly in the hands of *an abbot*, GRANTS the manor alone, without the advowſon, to *a biſhop*, who, in a re-grant to the king, inſerts both the manor and advowſon. A GRANT afterwards made by the king of the manor with the appurtenances, naming the advowſon, and deſcribing the whole as formerly belonging to the *abbot* and lately to *the biſhop*, paſſes the advowſon, *Rex v. Biſhop of Rocheſter*, 195, 196

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1. IF a *habeas corpus* be returnable in *Michaelmas* or *Eaſter Term*, the defendant is not intitled to an imparlance, 1

2. A *habeas corpus* lies to the *cinque ports* to bring up the body of a priſoner in execution, in order to charge him with an action in the ſuperior courts, 20

3. The return to a *habeas corpus* may be amended before the return is filed, 103

4. A *habeas corpus* returnable *immediatè* is not fixed to an hour, but to a convenient time, 116

5. A *habeas corpus* is a writ of right, and the higheſt writ a party can bring, *Buſhell's Caſe*, 119

6. A *habeas corpus* operates as a *ſuperſedeas* from the time it is *delivered*, *Haley's Caſe*, 195

7. The court of common pleas may grant a *habeas corpus* to bring up the body of a priſoner committed by a juſtice of peace for refuſing to give ſurety for his good behaviour, purſuant to the directions of a penal ſtatute, *Jones's Caſe*, 235

8. By 31. Car. 2. c. 2. any of the ſuperior courts in *Term time*, and any Judge of any of thoſe courts in *Vacation*, may award a *habeas corpus* to any priſoner whatever, 235 *notis*

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HEIR.

1. If an heir take an eſtate by diſcent, it ſhall be liable to the bond debts of his anceſtor, 2

2. By 29. Car. 2. c. 3. if any *ceſtui que truſt* leave a truſt in fee ſimple to diſcend to his heir, it ſhall be taken to be aſſets by diſcent, 2 *notis*

3. By 3. and 4. Will. and Mary, c. 14. where an heir is liable to the debts of his anceſtor, lands conveyed away before action brought are ſubject to execution, 2. 253.

4. The *heir* and *anceſtor* are correlatives and as one thing in contemplation of law, *Pybus v. Mitford*, 98

5. An heir at law cannot be diſinherited without expreſs words: and *Qu.* If he can be diſinherited unleſs the eſtate be expreſly given to another perſon? 189, 190

6. To debt againſt an heir on the bond of his anceſtor, the heir may plead another bond given by the adminiſtrator of the obligor in ſatisfaction, *Blythe v. Hill*, 225

HUE and CRY.

1. By 8. Geo. 2. c. 16 in an action of HUE AND CRY, any perſons inhabiting in the hundred, or in any franchiſe thereof, ſhall be admitted as a witneſs on behalf of the hundred, 74 *notis*

2. By 22. Geo. 2. c. 24. no perſon ſhall receive more on the ſtatute of Hue and Cry than 200l.; unleſs at the time of the robbery, there are two perſons preſent to atteſt the truth thereof, *ibid.*

3. A declaration upon the ſtatutes of HUE AND CRY is good after verdict, although it do not ſtate that the robbery was in the highway, *Savil's Caſe*, 221

HUSBAND AND WIFE.

1. In an action againſt huſband and wife, if the wife be arreſted and the coverture clearly proved, ſhe ſhall be diſcharged on common bail; but it is diſcretionary in the court to put the party to plead the coverture in abatement, *Anonymous*, 8

2. A huſband is liable for *neceſſaries* ſold to his wife, except ſhe has *eloped*, and he has given *notice* not to truſt her, *Dyer v. Eaſt*, 9

3. By the cuſtom of London, *a wife* being a *ſole trader*, may ſue or be ſued in the *city courts* without her huſband, *Moreton v. Packman*, 26

4. But a feme ſole trader cannot, by the cuſtom of London, ſue in the *ſuperior courts* without her huſband, *Caudel v. Shaw*, 26 *notis*

5. If a man be ſeiſed in right of his wife, and *the wife* be attainted of felony, the lord ſhall enter and ouſt the huſband; for he gains nothing but a bare perception of the profits till iſſue had, *Parſons v. Perns*, 91

6. A deed of ſettlement contains a proviſo, that the huſband, by the conſent of his wife in writing, may revoke it. *Qu.* If this *power* is executed by the wife *ſealing* a releaſe containing a clauſe of revocation of the former deed? *Mordaunt v. Peterborough*, 114

7. If a wife *elope*, and, on her huſband refuſing to be reconciled, ſhe live apart from him, and during this ſeparation a tradeſman furniſh her with goods contrary to the *expreſs prohibition* of the huſband, the huſband is not liable to pay for them, although they are found to be *neceſſary* for his wife, and ſhe has no *ſeparate maintenance*, *Manby v. Scott*, 124

8. If a *feme covert* make a contract, or buy any thing in the market or elſewhere without the allowance or conſent of her huſband, although it come to the uſe of the huſband, yet the contract is void, and ſhall not charge the huſband; but if a man command or licenſe his wife to buy things neceſſary, or agree that ſhe ſhall buy, he ſhall be bound by this command or licenſe, *ibid.* 126

9. If

9. If an action of treſpaſs be brought againſt huſband and wife, and the huſband only appears, and proceſs iſſues out againſt the wife, ſhe can never purchaſe her pardon or reverſe the outlawry, until ſhe be waived and outlawed, unleſs the huſband appear, 136

10. But when a wife has a ſeparate property ſettled upon her previous to the marriage, or her huſband has abjured the realm, or is baniſhed, or where a wife lives ſeparate from her huſband on a ſeparate maintenance allowed to her by her huſband after the marriage according to the cuſtom of *London* when a wife is a ſole trader, ſhe may, both in law and equity, make ſuch contracts as will be binding on herſelf, 143 *notis*

11. A wife can in no caſe render her huſband liable for *money* borrowed, although it is actually expended in *neceſſaries*, 143 *notis*

12. If huſband and wife recover in an action of debt, and the wife die, the huſband may take out execution on the judgment without a *ſcire facias*, *G. Miles' Caſe*, 179

13. A wife by the conſent of her huſband may make *an appointment* in the nature of *a will*, *Brook v. Turner*, 211

14. If perſonal property be given to a married woman to her ſole and ſeparate uſe, ſhe may diſpoſe of it by will without the aſſent of her huſband, 212 *notis*

15. By 29. Car. 2. c. 3. a huſband ſhall have adminiſtration of his wife's goods notwithſtanding the ſtatute of diſtribution of 22. & 23. Car. 2. c. 10.; but if adminiſtration of a wife's goods be committed to a ſtranger, he is rightful adminiſtrator until the letters are repealed, *Davies v. Curtis*, 231

16. A huſband may avow *alone* for a rent-charge deviſed to his wife, *Oſborne v. Walleeden*, 272, 273

17. If huſband and wife levy a fine *ſur conceſſit* to *A.* for ninety-nine years if he ſhould ſo long live, with a general warranty againſt all perſons during the term, an action of covenant will, on the death of the huſband, lie againſt the wife on the warranty, *Wootton v. Hele*, 290

18. If a huſband and wife make a leaſe for years, and ſhe accept the rent after his death, ſhe ſhall be liable to the covenants, 291

J.

JEOFAILS.

1. IN debt upon a leaſe for three years rent, the want of an averment of the continuance in poſſeſſion is aided by the verdict, *Goſtwick v. Maſon*, 3

2. If the original writ be *bad*, the defect is not aided by the ſtatutes of Jeofails, *Redman v. Edolfe*, 3

3. But by 18. Eliz. c. 14. no judgment ſhall, *after verdict*, be ſtayed or reverſed for any default in form, or for the want of any original writ, 3 *notis*

4. The want of an averment is helped by the ſtatutes of Jeofails, *Lee v. Edwards*, 14

5. The ſtatutes of Jeofails do not help when the court cannot give judgment, 67

6. In an action on the caſe on a promiſe to give a bond with ſufficient penalty, the omiſſion of ſtating the penalty is aided by a verdict, *Cotterall v. Marſhall*, 70

7. By 16. and 17. Car. 2. c. 8. and 4. and 5. Ann. c. 16. no judgment after verdict, &c. ſhall be reverſed for want of a *miſericordia* or *capiatur*, *&c.* 73 *notis*

8. In ejectment, for *corn mills*, and ſo many acres of *heath and furze* generally; the omiſſion of ſtating the kinds of mills, and the different quantities of heath and furze, is aided by a verdict, *Fitzgerald v. Marſhall*, 90

INCLOSURES.

An inquiſition upon the ſtatute againſt pulling down incloſures, 66

INDEBITATUS ASSUMPSIT.

See *Aſſumpſit*.

INDICTMENT.

1. The caption of an indictment on the 5. Eliz. c. 2. for exerciſing a trade without having ſerved *as* an apprentice to it, muſt ſtate it to have been found at the *quarter* ſeſſions, *Rex v. Turnith*, 26

2. An indictment quaſhed for want of the words *ad tunc et ibidem*, 26

3. If a ſtatute create a *new offence*, and inflict a penalty to be recovered "by bill, plaint, or information," yet an *indictment* will lie except there be the negative words, "*and not otherwiſe*," *Croſton's Caſe*, 34

4. So where *new offences* are prohibited by a general prohibitory clauſe in a ſtatute, an indictment will lie, *ibid.* 34 *notis*

5. So if a ſtatute preſcribe a particular mode of puniſhing an *old offence*, ſuch particular mode is cumulative, and does not take away the former remedy by *indictment*, *ibid.* 34 *notis*

6. But when a ſtatute enacts, that the doing of an act not puniſhable before, ſhall for the future be puniſhed in ſuch and ſuch a particular manner, the remedy by *indictment* cannot be purſued, *ibid.* 34 *notis*

7. An indictment will lie for ſaying of a corporation, "whenever a burgeſs of it puts on his gown, *Satan* enters into him," for it is a ſcandal on the government, *Rex v. Baker*, 35

8. An indictment "*in malum exemplum inhabitantium*," is bad, *ibid.* 35

9. An indictment will lie for *perjury* committed in a *court baron*, *Anonymous*, 55

10. An indictment will not lie for taking an *exceſſive diſtreſs*; the remedy is by action on the ſtatute of *Marlbridge*, *Rex v. Leginham*, 71

11. An indictment charging a man to be *communis oppreſſor* is too general, *ibid.* 71

12. An indictment for forcible entry into a *paſſage* or *way*, is not ſufficiently certain; nor into a meſſuage of which he was poſſeſſed for a certain "*term*" without ſaying "*of years*," *Rex v. Holmes*, 73

13. An indictment will lie againſt the maſter and workmen for erecting a booth for rope-dancers in a public ſtreet, *Hall's Caſe*, 76

14. An indictment quaſhed for want of the words *contra pacem*, *Anonymous*, 78

15. The *year* of Our Lord in the caption of an indictment muſt not be in figures (*ſed vide* 4. Geo. 2. c. 16. and 6. Geo. 2. c. 14.); but if the year of the king be ſtated, the other is ſurpluſage, 78

16. An indictment of nuſance for ſtopping a water-courſe in *Kenſington*, becauſe it ran "*in detrimentum omnium inhabitantium*, &c. is bad, *Thorowgood's Caſe*, 107, 108

17. To an indictment for not repairing a road, the defendant to diſcharge himſelf muſt *plead*, that ſuch a one *ratione tenuræ*, or that ſuch a part of the pariſh was bound by preſcription to repair it, for it cannot be given in evidence on the general iſſue, *Rex v. St. Andrews*, 112, 113

18. An indictment on a ſtatute muſt purſue the material words of it, *Rex v. Neville*, 295

INFANT.

1. An infant may maintain an action on a contract made for his benefit, but he cannot be ſued upon it himſelf, *Smith v. Bowin*, 25

2. An infant executor, though under ſeventeen years of age, may, with coexecutors who are of age, ſue by attorney, *Foxwiſt v. Tremain*, 47. 72. 296

3. A common recovery ſuffered by *an infant* under a PRIVY SEAL is not erroneous, although on the record *the guardian* be admitted "*ad ſequendum*," and his appearance entered "*in propriâ perſonâ*," for the guardian does *follow the ſuit* of the infant *in his own perſon*, *Heſketh v. Lee*, 48

4. An infant cannot reverſe a common recovery after his full age, *ibid.* 49

5. If an infant purchaſe an advowſon, and the incumbent die, *lapſe* ſhall incur, though he had notice of the death of the incumbent, 87

6. If

6. If an infant give or ſell goods and deliver them with his own hand, he ſhall have no action of treſpaſs againſt the donee or vendee by reaſon of the delivery, 137

7. An infant, unmarried and of fourteen years of age, may, by the cuſtom of London, bind himſelf apprentice, *Horn v. Chandler*, 271

INFORMATION.

1. An information on 3. Jac. 1. c. 7. againſt an attorney for extortion, muſt alledge in what court the extortion was committed, *Troy's Caſe*, 5

2. An information will not lie for taking an exceſſive diſtreſs, *Rex v. Leginham*, 71. 288

3. An information in the nature of trover lies in the court of exchequer to recover the goods of an outlaw forfeited to the crown, *Wilkinſon v. Rocklas*, 90

4. An information for not coming to church may be brought on the 23. Eliz. c. 1. ſ. 5. only reciting the clauſe in it that has reference to the 1. Eliz. c. 2. *Warren v. Sayre*, 191

INFERIOR COURT.

1. See COURTS, No. 3. 6. 13, 15.

2. VENIRE FACIAS, No. 16. 18. 21.

INTENDMENT.

1. A fine without a deed to lead the uſes, ſhall be intended to the uſe of the conuſor and his heirs, 2

2. The court will intend a good *original*, unleſs the contrary appear, *Redman v. Edolfe*, 3

IRELAND,

By 22. Geo. 3. c. 28. and 23. Geo. 3. c. 53. all appeals from the courts in Ireland to the courts in England are aboliſhed, 90 *notis*

ISSUE.

See Pleading, Deviſe, Eſtate.

JUDGE.

1. An action will not lie againſt A JUDGE for any acts done in his judicial capacity, *Buſhell's Caſe*,

2. An action will not lie againſt a Judge for a *wrongful* commitment, any more than for an erroneous judgment, *Hamond v. Howel*, 184

JUDGMENT.

1. If no *appearance* be entered, judgment will be erroneous, *Goodwin v. Harlow*, 2

2. If there be judgment againſt *three*, execution cannot be taken out againſt *one*, *ibid.*

3. By 18. Eliz. c. 14. no judgment ſhall, *after verdict*, be ſtayed or reverſed for any defect of form in, or for the want of, any original writ, *Redman v. Edolfe*, 3 *notis*

4. If a *ſcire facias* be brought in the king's bench on a recognizance in chancery, and there be *a demurrer* as to part and *an iſſue* as to part, yet the king's bench ſhall give judgment on the whole record, *Jefferſon v. Dawſon*, 29

5. If judgment await the deliberation of the court, and the plaintiff die before an opinion is given, yet if there are no *continuances*, judgment ſhall be entered *as if* it had been immediately given on return of *poſtea*, 38

6. A judgment, though acknowledged in the name of another, ſhall not be ſet aſide in a ſummary way until the offender is convicted, *Rawlins' Caſe*, 46

7. Judgment having been given in a *court of law* will not impede a *court of equity* from directing an *iſſue* in the cauſe, *Cole v. Forth*, 94

8. If *audita querela* be brought after the *day in bank*, the judgment ſhall be entered up as of that day, *Lampiere v. Meredith*, 111

9. Judgment, whenever it is entered, relates to the *day in bank*, *viz.* the firſt day of the Term, *Ayres v. Lenthall*, 112

10. A judgment againſt a mortgagee obtained ſubſequent to the mortgage, does not attach upon aſſets produced by a releaſe of the equity of redemption.

tion. *Sed Qu.* If this diſtinction is not done away? *Freeman v. Taylor*, 115

11. If judgment be given againſt a plaintiff upon the inſufficiency of his declaration, the defendant cannot plead this judgment to a ſecond action for the ſame cauſe, although the entry be a *nil capiat* inſtead of *eat ſine die*, *Lampen v. Kedgwin*, 207

12. If two actions be brought on two ſeveral bonds, the plaintiff who firſt ſigns judgment ſhall have priority of execution, *Anonymous*, 253

13. By 29. Car. 2. c. 3. the time of ſigning judgment ſhall be docketed, and, as againſt purchaſors, ſhall only bind lands from that time, 253 *notis*

JURY.

1. A defendant is entitled to a copy of the panel to prepare himſelf for his challenges, 15

2. The queſtion of what is *reaſonable* and what *unreaſonable*, is a queſtion of *law* for the court, and not of *fact* for the jury, *Catterall v. Marſhall*, 70

3. A juror cannot be withdrawn in an aſſiſe, 123

4. In what caſe a *ſerjeant at law* may be returned as a juror, 226, 227

5. By 24. Geo. 2. c. 18. no challenge ſhall be taken to any panel of jurors for want of a *knight*'s being returned, &c. 226 *notis*

L.

LABOURERS.

AN indictment for retaining a ſervant without a teſtimonial from his laſt maſter quaſhed, 78

LEASE.

1. A leaſe created *de novo* out of the inheritance to *A.* and the heirs male of his body, does not determine by his death without iſſue, but, like a term *in groſs*, ſhall go to his executors, *Burgis v. Burgis*, 115

2. A leaſe made the 10th October, *habendum* from the 20th day of November, for five years, is void for *uncertainty*.—*Sed Qu.* If it does not commence from the delivery? 180

3. If two manors have been uſually let for ſixty pounds a-year, and the biſhop grant a leaſe of one of them only, reſerving thereon the ſame rent at which both the manors were let, yet this leaſe is good; for the 1. Eliz. c. 19. ſays, that the old accuſtomed rent *or more* ſhall be reſerved, *Threadneedle v. Lynam*, 203

4. On a leaſe for ninety-nine years, if *A. B.* and *C.* ſhould ſo long live, reſerving a heriot or forty ſhillings to the leſſor and his aſſigns, at the election of the leſſor his heirs and aſſigns, after their ſeveral deaths *ſucceſſivè*, as they are named in the indenture, the deviſee of the leſſor cannot diſtrain. *Sed Qu.* If the leaſe does not determine on *C's.* dying before *A.* and *B.*? *Ingram v. Tothill*, 217

LEET.

The duty of an *ale-taſter* appointed by a court-leet, is to make preſentment at the leet, on his finding the liquor not according to the aſſiſe, 202

LETTERS PATENT.

Oyer cannot be demanded of *letters patent* after the expiration of the term in which a *profert* of them is made, *Anonymous*, 69

LEVANT & COUCHANT.

In what caſe it is neceſſary to aver *levant et couchant*, 63. 74

LIBEL.

1. If a petition to parliament be referred to a committee of the houſe, an action will not lie for printing and publiſhing a number of copies for the uſe of the members, although the matter therein contained be falſe and ſcandalous, *Lake v. King*, 58, 59

2. But if a perſon print and publiſh a libellous anſwer to a petition to parliament, before ſuch petition is referred

to

to a committee, an action will lie, *ibid.* 58 *notis*

LICENSE.

See Leaſe, Pleading.

LIMITATION OF ESTATES.

1. If a term be deviſed to *A.* for life, with remainder to *B.* for life, and if *B.* die without iſſue of his body begotten, then to *C.* the *limitation* over to *C.* is too remote to take effect, *Love v. Wyndham*, 51

2. If a deviſe be made to *A.* for life, with remainder to *B.* and the heirs of his body, provided that if *B.* marry without the conſent of *C.* then the eſtate ſhall go to *D.* this is a *limitation* and not a condition, *Porter v. Fry*, 86

3. Expreſs words of condition may, by conſtruction, in a will amount to no more than a limitation, 86, 87

LIMITATION OF ACTIONS.

1. To an *aſſumpſit*, on a promiſe to pay ſo much out of the net-proceeds of a certain parcel of goods to be imported, the defendant may plead that "the cauſe of action did not ariſe within ſix years," *Martin v. Delboe*, 71

2. The ſtatute of limitations cannot be pleaded to an action on an executory promiſe, *Buckler v. Moor*, 89

3. An action of debt againſt a ſheriff for money levied under a *fieri facias* is not within the ſtatute of limitations, *Cockram v. Welby*, 245, 246

4. To an action of *aſſumpſit* upon an *account ſtated*, the defendant may plead the ſtatute of limitations, *Farrington v. Lee*, 269

5. But if before action brought, the balance upon an *account ſtated* be carried forward, and the account again becomes an *account current*, this is not within the 21. Jac. 1. c. 16. 270

LIVERY.

If one of two women who are joint-tenants in fee make a feoffment to a man, with *livery* within view, and marry the feoffee before he enters on the land, his entry after the marriage is a good execution of the livery; for the livery being *within view*, an irrevocable intereſt paſſed to the feoffee, and the ſubſequent entry ſhall relate back, ſo as to make the feoffment perfect, *Parſons v. Perns*, 91

LONDON.

1. The city of London may fine a freeman for not taking up his livery, and recover it by action of debt, *Grafton's Caſe*, 10

2. By the cuſtom of London, a married woman may ſue and be ſued in the city courts, as a *feme ſole trader*, without her huſband; but *Qu.* If the trade of a *victualler* be within this cuſtom? *Moreton v. Packman*, 26

3. But a *feme ſole trader* cannot be ſued in the *ſuperior courts* without her huſband, *Caudell v. Shaw*, 26 *notis*

4. The court of aldermen in the city of London may impoſe a reaſonable fine on a perſon for marrying a city orphan without their conſent, although he be not a *freeman*, and he have no notice that ſhe was a city orphan, and the marriage be out of the city; and on refuſal to pay the fine, the court may commit the offender, *Harwood's Caſe*, 77-79

5. The LORD MAYOR of London is conſervator of the river *Thames*, and it is common to all fiſhermen, 106

6. The courts will not take notice of the cuſtoms of London until certified by THE RECORDER, 212

7. The cuſtom of *foreign attachment* has been certified to the courts by the Recorder of London, 212 *notis*

8. By the cuſtom of London, an infant may bind himſelf apprentice, and the maſter ſhall have the ſame remedies as if the apprentice had been of full age, *Horn v. Chandler*, 275

M.

MALICIOUS PROSECUTION.

AN action for a malicious proſecution will not lie againſt one attorney for ſuing

ſuing another in an inferior court, or for ſuing on the retainer of a client, although he knew there was no cauſe of action, *Anonymous*, 209, 210

MANDAMUS.

1. A *mandamus* will not lie to reſtore the fellow of a college at one of the univerſities, who has been removed by *the viſitor* appointed by *the founder* of the college, *Appleford's Caſe*, 82, 83
2. A *mandamus* will not lie to THE BENCHERS of an inn of court, *ibid.* 85

MANOR.

1. A cuſtom for the tenants of a manor to have a ſole and ſeparate paſture, in excluſion of the lord, is good, *Hopkins v. Robinſon*, 74, 75
2. A manor may contain ſeveral ſmaller manors in which courts are held for the eaſe of the tenants, but in law they ſhall be all taken as one manor, *Green v. Proude*, 118
3. *Toll-traverſe* may be appurtenant to a manor, and the appurtenancy is not deſtroyed by the manor coming into the hands of the crown, *James v. Johnſton*, 231

MARRIAGE.

1. The parſon of a donative cannot marry perſons without a licenſe, *Maddox v. Peterborough*, 22
2. By 26. Geo. 2. c. 33. ſ. 8. it is felony in a clergyman to celebrate matrimony without publication of *banns* or *licenſe* firſt obtained, *ibid.* 22
3. A man may not marry his wife's ſiſter's daughter, 25
4. The marrying of a *baſtard* who, if legitimate, would have been within the Levitical degrees, is illegal, *Harris v. Jeffell*, 25 *notis*
5. A city orphan cannot marry without the conſent of the court, *Harwood's Caſe*, 77

MARKET.

If a man have a fair, a market, or a ferry, and another erect a fair or market, or eſtabliſh a ferry to his prejudice, an action will lie, although not held or worked on the ſame days, *Yard v. Ford*, 69

MELIUS INQUIRENDUM.

1. The court will grant a *melius inquirendum* on proof of corrupt practice in a coroner on taking an inquiſition *poſt mortem*, *Rex v. Stanlake*, 82
2. A *melius inquirendum* is, upon default of THE CORONER, directed to the ſheriff, *ibid.*

MISERICORDIA.

1. By 16. & 17. Car. 2. c. 8. no judgment after verdict, confeſſion, *relictâ veriſicatione*, or *cognovit*; and by 4. & 5. Ann. c. 16. after *nihil dicit*, or *non ſum informatus*, ſhall be reverſed for want of a *miſericordia* or *capiatur* being entered, 73 *notis*
2. The practice of the courts of king's bench and common pleas on the entry of the *miſericordia*, &c. *ibid.*

MISNOMER.

1. *Miſnomer* cannot be pleaded to a writ of *excommunicato capiendo*, *Bonnefield's Caſe*, 70
2. In debt on bond the defendant was ſued by the name of *Jaucob* inſtead of *Jacob*, and held no *miſnomer*, *Aboab's Caſe*, 107
3. A leaſe made by an eccleſiaſtical perſon ſhall not be avoided for *miſnomer*, 115

MONOPOLY.

By 21. Jac. 1. c. 3. all monopolies by letters patent. &c. or anything tending to the ſame, are void, 258 *notis*

MONSTRANS DES FAITS.

The plaintiff in *quare impedit* declared upon a grant of an advowſon to his anceſtor, and ſays, *hic in curiâ prolatâ*, but has it not to ſhew. It was moved, that as the defendant had the deed in his hands, the plaintiff might take advantage of a copy thereof which

which appeared in an inquiſition found in the time of Edward the Sixth; but denied, 266

MORTGAGE.

If a mortgagor confeſs a judgment ſubſequent to the mortgage, and die, and the mortgagee buy the equity of redemption of the heir, the money paid for this purchaſe is aſſets in the hands of the heir, *Freeman v. Taylor*, 115

N.

NECESSITY.

NECESSITY is two-fold, *neceſſitas ſimplex vel abſoluta*, and *neceſſitas qualificata vel convenientia*, 139

NEGATIVE PREGNANT, *ſee* 223
See Pleading.

NEW ASSIGNMENT.

In treſpaſs, if the place WHERE be not named, the defendant may ſtate another time, and put the plaintiff to a *new aſſignment*, *Marſhal v. Ditchin*, 89

NONCLAIM.
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A caſe upon the *Oxford act* againſt *nonconformiſt* miniſters, 68

NON-TENURE.

1. "Non-tenure" pleaded in abatement, 181
2. "Non-tenure" when a plea in *bar* and when only in *abatement*, 249, 250

See Formedon, Abatement, Pleading.

NOTICE.

1. If an eſtate be ſettled on *A.* provided that ſhe do not marry without the conſent of *B.* the eſtate will be forfeited if ſhe marry without ſuch conſent, although ſhe had no *notice* of the limitation previous to the marriage; *Porter v. Fry*, 86
2. If an infant purchaſe an advowſon, and the incumbent die, lapſe ſhall incur, although he had *notice* of the death of the incumbent, 87
3. If lands be deviſed to *the heir* with a condition, he muſt have notice of condition, but notice is not neceſſary if lands be ſo deviſed to a ſtranger, 87
4. It is a rule, that "every man is bound to *take notice*, when there is no one bound to *give notice*," 87
5. Where perſons are equally privy and concerned, there needs no notice, 87
6. In what caſe notice of a writ of error is neceſſary, *Ayres v. Lenthall*, 112
7. In what caſe an executor muſt have *notice* of teſtator's ſpecialties, to prevent his paying ſimple contracts, *Brooking v. Jennings*, 175
8. Common fame, or accidental intimation of a fact, may in ſome caſes amount to legal notice, *Fry v. Porter*, 311

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10. To aſſault and battery, the defendant may plead that it was in defence of his *poſſeſſion*; but if he ſay *molliter inſultum fecit*, inſtead of *molliter manus impoſuit*, it will be bad on *demurrer*, *Jones v. Treſilian*, 36

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12. To debt on bond to ſave harmleſs, and *non damnificatus* pleaded, if the plaintiff ſtate payment in damage, and the defendant rejoin that he tendered the money, and that the plaintiff paid it *ae injuriâ ſuâ propriâ*, it is *a departure*, *Richards v. Hodges*, 43, 44

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23. In an avowry for a ſole and ſeparate paſture in a manor, if the right be not claimed as a *preſcription in the tenants*, but as *a cuſtom in the manor*, it is not neceſſary to ſhew ſpecial title, 75 *notis*

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25. To an action on an *executory promiſe*, the defendant cannot plead *non aſſumpſit infra ſex annos*, *Buckler v. Moor*, 89

26. In treſpaſs, if the place WHERE be not named, the defendant may ſtate another time, and put the plaintiff to a *new aſſignment*, *Marſhal v. Ditchin*, 89

27. A declaration in ejectment for *corn-mills, and* 100 *acres of heath and furze*, generally, is good after verdict, 90

28. In pleading a breach of a covenant for quiet enjoyment, it is not ſufficient to ſay that ſuch a perſon entered *claiming title*, without ſhewing the *kind of title* under which he claimed, *Norman v. Foſter*, 101

29. If an action be brought by one tenant in common without his companion, the defendant may plead *cotenancy* in abatement, *Blackborough v. Greaves*, 102

30. *Jaacob* inſtead of *Jacob* cannot be pleaded as a miſnomer, *Aboab's Caſe*, 107

31. An indictment for a nuſance, concluding to the *detriment of the inhabitants*, is bad, *Thorowgood's Caſe*, 107 108

32. In pleading a recovery, it is not neceſſary to ſay any thing of *the king's ſilver*, *Benſon v. Hodſon*, 108

33. To an indictment for not repairing a road, matter of diſcharge muſt be pleaded, *Rex v. St. Andrew's*, 112, 113

34. If an executor give bond for payment of a legacy, he cannot plead to an action on it, that the teſtator revoked the will, *Backwell v. Bardue*, 113

35. In an action againſt an executor for a debt due from the teſtator out of a particular fund, it muſt be averred that the fund was ſolvent, *Anonymous*, 163

36. A perſon, though neither conſtable, churchwarden, nor other officer, may juſtify an action of aſſault and battery, by pleading that the plaintiff diſturbed the congregation while the miniſter was performing the rites of burial, and that he *manus molliter impoſuit* to prevent ſuch diſturbance, *Glover v. Hynde*, 168

37. To an action of debt on bond againſt an executor, if the defendant plead that the teſtator was indebted to the plaintiff upon a ſtatute-merchant yet in force, and no aſſets *ultra*, the plaintiff may reply, that the ſtatute was deſtroyed by fire, *Buckley v. Howard*, 186

38. The beſt and ſureſt way of drawing an information for not coming to church, is on the ſtatute of 23. Eliz. c. 1. ſ. 5. reciting the clauſe in it that refers to 1. Eliz. c. 2. *Warren v. Sayre*, 191

39. To a *ſcire facias* brought by an executor on a judgment obtained by his teſtator, the defendant cannot plead that a *ca. ſa.* iſſued againſt him, upon which he was taken and in the cuſtody of the warden of the Fleet, and that he paid the condemnation-money to THE WARDEN, *Compton v. Ireland*, 194, 195

40. To an action on a preſcription for an annuity due from the rector of a church, it is no plea to ſay that the church is deſtroyed, *Anonymous*, 200

41. In an action againſt the officer of *a leet* for ſeizing corrupt victuals, if the defendant juſtify under a cuſtom, the plaintiff may reply, that the victuals were not in a corrupt ſtate, *Vaughan v. Atwood*, 202

42. To

42. To an *aſſumpſit* upon a *quantum meruit* and an *indebitatus* the defendant may plead *infimul computâſſent*, and that, in conſideration of paying the balance, the plaintiff promiſed him a diſcharge, *Milward v. Ingram*, 205, 206.

43. On a *ſpecial promiſe*, payment, or any other legal diſcharge, muſt be pleaded, *Fitz v. Freeſtone*, 210

44. To treſpaſs for immoderately riding the plaintiff's mare, the defendant cannot plead that the plaintiff lent him the mare and gave him *licence* to ride her, and that by virtue of this licence *he* and *his ſervant* had rid upon the mare by turns, *Bringloe v. Morrice*, *ibid.*

45. To an action brought by a perſon as adminiſtrator, the defendant may plead that the executor named in the writ has adminiſtered, 214

46. A plea may be good in *abatement*, though it contain matter in *bar*, *ibid.*

47. In pleading an avowry, under a leaſe for lives, it muſt appear that the leſſees were alive at the time the diſtreſs was taken, *Ingram v. Tothil*, 216

48. The manner in which a common recovery muſt be pleaded, *Wakeman v. Blackwell*, 218, 219

49. In declaring in a *formedon*, if part of the words of *the writ* are introduced into the declaration, concluding with an *et cetera*, the "&c." ſhall be taken to include the whole, *Barrow v. Hagget*, 219, 220

50. To debt on bond, the defendant cannot plead another bond given in ſatisfaction; but if the plaintiff take iſſue on ſuch a plea, and it is found againſt him, the defendant ſhall have judgment, *Blythe v. Hill*, 221

51. In *audita querela* the outlawry of the plaintiff may be pleaded in diſability, *Higden v. Whitechurch*, 224

52. To debt againſt an heir on the bond of his anceſtor, the heir may plead that the obligor, his anceſtor, died inteſtate, that adminiſtration was committed to *A. B.* and that *he*, the adminiſtrator, gave the plaintiff another bond in full ſatisfaction of the former, *Blythe v. Hill*, 225

53. On a declaration in covenant to pay forty pounds a-year ſo long as the defendant ſhould continue regiſter, if the defendant plead that the office was granted to *A. B.* and *C.* for their lives, and that he enjoyed it ſo long as they lived and no longer, and that ſo long he paid the ſaid forty pounds; the plaintiff may reply, that the defendant did enjoy the office longer and had not paid the money; but he muſt aſſign as breach, that the defendant did not pay, *Gayle v. Betts*, 227

54. Upon a plea of *no award*, if the plaintiff in his replication ſet forth an award, and aſſign a breach, the defendant cannot take iſſue on the breach, for it would be confeſſing what he had denied before, *ibid.*

55. If a plaintiff in a declaration in *quare impedit* alledge that *A.* was ſeiſed in fee of ſuch a manor, to which the advowſon was appendant, he need not, in ſtating the preſentation, alledge that it was *tempore pacis*, *Strode v. Biſhop of Wells, &c.* 230

56. To an action of debt brought by a perſon as adminiſtrator to a married woman, the defendant cannot plead that the huſband is alive, and that adminiſtration of the wife's goods ought *de jure* to be committed to him, *Davies v. Cutts*, 231

57. In debt againſt *A.* as executor of *B.* if he plead that he is *adminiſtrator* and not *executor*, he muſt expreſsly ſhew that *B.* died inteſtate, and the time when adminiſtration was granted; and conclude in *abatement* and not in *bar*, *Juſtice v. White*, 239

58. Pleadings in an action on the caſe againſt a ſheriff for a falſe return, *Page v. Tulſe*, 240

59. The ſtatute of limitation cannot be pleaded to an action of debt againſt a ſheriff for money levied under a *fieri facias*, *Cockran v. Welby*, 246

60. *Non-tenure* when pleaded to "*the tenure*" is a plea in *bar*; but when pleaded to "the tenancy" is in *abatement*, 250

61. A

61. A juſtification in treſpaſs that the plaintiff was rector of ſuch a church, and that the goods were taken under *a ſequeſtration* of the profits of the rectory for the reparation of *the chancel*, muſt aver, that no more was taken than was neceſſary to the expence of reparation, *Walwyn v. Awbery*, 259

62. Pleading on an indenture of apprenticeſhip by the cuſtom of *London*, 271

63. To treſpaſs and falſe impriſonment, the defendant may juſtify by virtue of *an attachment* out of the court of chancery, *Furlong v. Bray*, 272

64. In *quare impedit*, if the king *ſuggeſt* a title, and the defendant *make* a title and traverſe the king's title, the king in his replication muſt maintain his own title ſuggeſted in the declaration; for it is not ſufficient for him to traverſe and deſtroy the title made by the defendant, *Rex v. Hinkley*, 276

65. To debt on an award, if the defendant plead "no award," and the plaintiff ſet out an award; if the defendant rejoin that "it was not delivered," and conclude with a *verification*, it is bad; for the rejoinder, which confeſſes an award, is *a departure*; and the affirmation that "it was delivered" ought to have concluded *to the country*, *Roberts v. Marriott*, 289

66. In covenant on a general warranty for quiet enjoyment, the defect, in aſſigning a breach, that *A.* having lawful title entered, &c. without ſhewing what title he had, is not cured by a verdict for the plaintiff, in an iſſue on a plea *proteſting* that *A.* had not any lawful title, and *affirming* that he did not diſturb the plaintiff, *Wootton v. Hele*, 293

POSSESSIO FRATRIS.

A copyholder having a daughter by his firſt wife, and a ſon and a daughter by his ſecond wife, ſurrenders his eſtate to his eldeſt daughter for five years, with remainder to his own right heirs, and dies. The daughter is admitted; the ſon dies; the five years expire.—The admittance of the daughter is the admittance of the ſon in remainder as right heir to his father; and the ſon, being ſo ſeiſed, creates a *poſſeſſio fratris*; which occaſion the eſtates to *deſcend* to his ſiſter of the whole blood only, and not to his two ſiſters together, as heirs to the father, *Blackburne v. Greaves*, 129

POWER.

1. A power given to a huſband to revoke a deed of ſettlement, with the conſent of his wife in writing, is not executed by the wife ſealing a deed containing a clauſe of revocation, *Mordaunt v. Peterborough*, 114

2. If there be a power of revocation, and a leaſe for years is made, it is ſuſpended *quoad* the term; but after it is good, *ibid.* *ibid.*

3. A man deviſing an eſtate to his wife for life, "to be *diſpoſed of* by her to ſuch "of my children as ſhe ſhall think fit," gives her an eſtate *for life*, with *a power* to give it to any of the children *in fee*, *Lieſe v. Saltingſtone*, 189

4. The marriage of the widow cannot ſuſpend the power, *Tomlinſon v. Deighton*, 190 *notis*

5. A wife in ſuch a caſe is a mere inſtrument to carry the intent of the donor of the power into execution, *ibid.*

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1. In an action againſt ſeveral defendants, the plaintiff cannot declare till appearance entered, 5

2. A plea to an illegal voucher in *quod ei deforciat*, is, if adjourned, peremptory on the tenant, *Vaughan v. Caſewel*, 8

3. If an attorney be ſued time enough to give him two rules to plead, judgment may be ſigned within the Term, *ibid.*

4. An action cannot be *diſcontinued* after verdict, 13

5. A plea in abatement is too late after imparlance, 14

6. The Court will ſtay proceedings if execution be taken out contrary to agreement, *Vial v. Warner*, 20

7. Rio-

7. Proceedings ſhall be ſtayed on a cauſe being referred, 24

8. A plaintiff muſt declare within three Terms, or the defendant may be diſcharged on filing common bail, *Bear v. Bennett*, 25

9. If the Court take time to conſider, judgment ſhall be given *as if* it had been given upon the return of the *poſtea*, though the plaintiff die in the intermediate time, 38

10. The Court will, after judgment on demurrer, give leave, under circumſtances, to diſcontinue on payment of coſts, *Roberts v. Marriott*, 42

11. In a *nocłanter* for proſtrating incloſures, on judgment for damages, one *diſtringas* will ſerve for ſetting up the incloſures and the damages alſo, *Rex v. Eaſt Grinſtead*, 66

12. If a *relicta verificatione* be entered after *non eſt factum* pleaded, the defendant ſhall only be amerced, *Moreclack v. Carleton*, 73

13. By 16. & 17. Car. 2. c. 8. and 4. & 5. Anne, c. 16. no judgment ſhall be ſtayed or reverſed after verdict, &c. for want of a *capias* or *miſericordia*, &c.—The practice of the courts of king's bench and common pleas in conſequence of theſe ſtatutes, 73 *notis*

14. In debt on bond, in an inferior court, the defendant may by cuſtom pray a *writ of enquiry* after a *cognovit actionem*, *Brightman v. Parker*, 96

15. If an *audita querela* be brought after the *day in bank*, but before judgment entered, it ſhall be entered as of that day, to prevent the plea of *nul tiel record*, *Lampriere v. Mereday*, 111

16. A writ of error muſt be *allowed* within four days after *taken out*, or it will not prevent execution, *Ayres v. Lentball*, 112

19. Giving time to plead countenances the action, but granting imparlances does not, 184, 185

18. In action of debt, the firſt proceſs is *ſummons*; and if the defendant appear, *common bail* ſhall be filed; but if he do not, a *capias* iſſues to hold to *ſpecial bail*, *Hale v. Booth*, 236

PRÆMUNIRE.

A defendant againſt whom judgment has been obtained in the court of king's bench, cannot be ſued upon the ſtatute of *præmunire* for bringing an *Engliſh bill* in the court of chancery to be relieved againſt ſuch judgment, *King v. Standiſh*, 59

PREROGATIVE.

1. The king, by his prerogative, may change *the venue* before appearance, *Rex v. Webb*, 2

2. Books that have no certain author, as the almanack printed before the Book of Common Prayer, are deemed prerogative copies; and the king may grant the excluſive right of printing them, *Stationers Company v. Seymour*, 257

PRESCRIPTION.

1. In pleading a preſcription by a corporation for a common without ſtint, it need not be alledged that the beaſts were *levant et couchant*, *Meller v. Staples*, 6

2. In pleading a preſcription for ſole and ſeparate paſture, it is not neceſſary to ſay "for cattle *levant et couchant*," *Hopkins v. Robinſon*, 74, 75

3. A man cannot preſcribe for ſole common, but he may for ſole *paſture*, *ibid.* 75

4. A preſcription for toll, in conſideration of maintaining *the quay*, and keeping a buſhel to meaſure ſalt, is not good, *Warner v. Prideaux*, 104, 105

5. In a preſcription for toll upon the ſea, a good conſideration muſt be alledged, *ibid.* 105

6. In a preſcription for a free fiſhery, a ſeveral fiſhery, or a common fiſhery, the party muſt ſhew the foundation of his claim, *Fitzwalter's Caſe*, 105, 106

7. A *preſcription* pre-ſuppoſes *a grant*, and muſt be conſtrued according to the intent of its original creation, *Howel v. King*, 191

8. A writ of annuity will lie upon an annuity by a preſcription againſt the rector

of a church; and, being due in reſpect of the profits which ariſe from tithe and glebe, it is no plea to ſay that the church is deſtroyed, *Anonymous*, 200

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2. The ſtatute of 21. Jac. 1. c. 3. againſt monopolies ſhall not extend to any letters patent concerning printing, 258 *notis*

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2. An archdeacon is privileged from the office of expenditor to commiſſioners of ſewers, 282

See Attorney, Conſtable, Barriſter.

PROCTOR.

Qu. If a proctor may ſue in the ſpiritual court for his fees, *Horton v. Wilſon*, 167 *notis*

PROHIBITION.

1. The Court will prohibit the ſpiritual court from proceeding againſt a perſon for keeping a ſchool without licence, if it appear that the patronage is not in the ordinary but in the founder, *Bates v. Kendal*, 3
2. The Court will not grant a prohibition upon a meer ſurmiſe that the matter is not within the juriſdiction of the inferior court, *Wayman v. Smith*, 64
3. But if after imparlance a plea be tendered to an inferior court, alledging the matter to be out of its juriſdiction, and the court refuſe to receive the plea, a prohibition ſhall go, *ibid.* 64 *notis*
4. If the want of juriſdiction appear on *the face of the proceedings*, in an inferior court, a prohibition ſhall go even to a court of appeal, and after the cauſe is remitted, and coſts awarded to the appellant, *ibid.* 64 *notis*
5. Prohibition ſhall not go to an inferior court, although the cauſe of action aroſe out of the juriſdiction, unleſs that matter has been tendered in a plea to the court below, and refuſed, *Cox v. St. Albans*, 81
6. If a proctor libel in the ſpiritual court for his *fees* in a ſuit there, and alſo for *expences* of a journey, and other diſburſements, a prohibition ſhall go for all except *the fees*, *Horton v. Wilſon*, 167
7. If an *apparitor*, a *regiſter*, or a *pariſh-clerk*, ſue for their fees in the ſpiritual court, a prohibition ſhall go, *ibid.* 168 *notis*
8. A prohibition lies to the ſpiritual court againſt a citation *ex officio* to anſwer articles, *Birch v. Lake*, 185
9. On a ſuggeſtion that a teſtatrix was a married woman, the ſuperior courts will prohibit the prerogative court from trying the fact, whether ſhe had power from her huſband to make a will, *Brook v. Turner*, 211
10. The Court will not grant a prohibition to a libel againſt pariſhioners for not repairing *the church*, although the word "*church*" does, in common parlance, include *the chancel*, which they are not bound to repair, *Rogers v. Devenant*, 237

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See Aſſumpſit, Agreement.

Q.

QUARE IMPEDIT.

1. IN *quare impedit*, if the plaintiff make his title by a preſentation he ought to ſay that it was *tempore pacis*; but if the title be by reaſon of his being ſeiſed

ſeiſed of a manor, to which the advowſon is appendant, it is not neceſſary, *Stroud v. Biſhop of Wells*, 230

2. The proceſs in *quare impedit* is ſummons, attachment, and diſtreſs; and if the defendant do not appear, or caſt an eſſoin, there ſhall be judgment for the plaintiff; but unleſs the defendant be perſonally ſerved with the ſummons, and good ſummoners returned by the ſheriff, the judgment by default ſhall be ſet aſide, *Searl v. Long*, 248

3. A recovery in *quare impedit* againſt a clerk whom the king preſented by *uſurpation*, avoids the uſurpation, *Rex v. Thornborough*, 253

4. By 7. Anne, c. 18. no uſurpation ſhall diſplace the intereſt of any perſon intitled to an advowſon; but ſuch perſon may *preſent*, or have *quare impedit*, 256 *notis*

5. In *quare impedit*, if the king ſuggeſt a title, and the defendant make a title and traverſe the king's title, the king in his replication muſt maintain his own title ſuggeſted in the declaration; for it is not ſufficient for him to traverſe and deſtroy the title made by the defendant, *Rex v. Hinkley*, &c. 276

QUE ESTATE.

A thing that lies in *grant* cannot be claimed by a *que eſtate* directly by itſelf; but it may be claimed as appurtenant to a manor, by a *que eſtate* in the manor, *James v. Johnſon*, 231, 232

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The nature of this writ, 173

R.

RECOVERY.

1. AN infant who ſuffers a common recovery, cannot reverſe it after he comes of full age, 49. 246

2. If an infant tenant, in a common recovery, is admitted by guardian *ad ſequendum*, it is not error, 48

3. If a leſſee for years be made tenant to the *præcipe*, for the ſuffering a common recovery, that does not extinguiſh his term, *Fountain v. Coke*, 107

4. *A.* covenants to levy a fine to the uſe of himſelf and the heirs male of his body; remainder in tail to ſeveral others; remainder to his own right heirs; PROVIDED, that if there be a failure of iſſue male of his body, and *B.* his daughter be married, OR of age, then ſhe ſhall have 200l. a-year for ten years: If *A.* dies, leaving iſſue male, who enters, makes a leaſe for 1000 years, levies a fine, and ſuffers a recovery, and dies without iſſue, his ſiſter *B.* being married AND of age, the *annuity* to *B.* is barred by the recovery; for the remainder is barred out of which it iſſued; and it cannot be charged on the *leaſe*, for that was derived out of an eſtate tail, preceding the commencement of the annuity, *Benſon v. Hodſon*, 108

5. A recovery pleaded, without ſaying anything of the *king's ſilver*, or the execution of it by *entry*, is good, *ibid.* 108

6. A recovery by tenant in tail, will not bar a rent-charge granted by him out of the eſtate tail, *ibid.* 109

7. If there be a limitation to a uſe on condition, and the *ceſtuy que uſe* ſuffers a recovery, it will not deſtroy the condition, *ibid.* 109

8. A recovery ſuffered by tenant in tail, will bar a rent by him in remainder. The reaſon given, 110

9. If a man make a gift in tail, determinable on non-payment of 1000l. with remainder in tail, and other remainders over, and the tenant in tail ſuffer a recovery, all the remainders are barred, although he neglect to pay the 1000l. at the day, 111

10. If poſſeſſion has continued from the time of an ancient recovery, the Court will preſume a ſurrender by tenant for life, in order to make a good tenant to the *præcipe*, *Green v. Proude*, 117

11. A recovery of lands in *ancient demeſne* deſcribing them as lying in *Dale* is good, although there are ſeveral *vills* in the pariſh, *ibid.* 118

12. After recovery ſuffered, it cannot be objected that the *præcipe* is of land in *a pariſh* inſtead of a *vill*, *Green v. Proude*, 118

13. A recovery of lands lying within *a liberty*, is good, although they lie in two diſtinct *towns* within the liberty, *Jones v. Wait*, 206

14. A common recovery pleaded, "that "*A.* being ſeiſed *in fee*, a *præcipe* was "brought againſt *B.* and *C. adtunc* "*tenentes liberi tenementi*," or without ſhewing how they had the freehold, is bad, *Wakeman v. Blackwell*, 218, 219

15. It is not neceſſary that the tenant, in a common recovery, ſhould have a freehold at the time of the purchaſe of the writ; if he have a freehold at the time of the return it is ſufficient, *ibid.* 219

16. Lands lying in the pariſh of *Dale*, but out of the vill of *Dale*, paſs by a common recovery deſcribing them as lying in *Dale* generally, although the writ of covenant deſcribes them as lying in the pariſh of *Dale*, *Addiſon v. Otway*, 250

RECUSANT.

1. An information for not coming to church, may be brought on the ſtatute 23. Eliz. c. 1. reciting the clauſe in it that refers to the 1. Eliz. c. 2. 191

2. To an *indictment* for recuſancy, "con- "formity" is a good plea; but not to an *action of debt*, *Anonymous*, 213

REGISTER.

A regiſter cannot ſue in the ſpiritual court for his fees, 168 *notis*

RELEASE.

1. A father being tenant for life, with remainder to his ſon in fee, *an annuity* is given, by deed of ſettlement, to the *ſon* during the life of the *father*; the ſon RELEASES to the father "all arrears of "rent, annuities, *titles*, and demands," to the day of the releaſe. *Quære*, Whether this paſſes the *inheritance* as well as the *annuity*? *Auſtin v. Lippencott*, 99

2. A releaſe of all *demands* will not extinguiſh *a rent*; *ſed quære*, If it were a releaſe of all demands out of land? *ibid.* 100

3. By a releaſe of *totum ſtatum ſuum*, the fee ſimple will paſs, *Wilſon v. Robinſon*, 101

REMAINDER.

1. A contingent remainder is ſupported by a preſent right of entry, *Zouch v. Clare*, 92

2. If *a term* be deviſed to *A.* for life, with remainder to *B.* for life, and if *B.* die *without iſſue of his body begotten* then to *C.* the limitation over to *C.* is too remote to take effect, *Love v. Wyndham*, 50

3. If a grant be made of a term of years to *A.* for life, with remainder to *A.* and *B.* his wife for life; remainder to the firſt ſon of their two bodies, and ſo on to their other ſons ſucceſſively; and if they ſhould have no ſons, then with remainder over to their daughters; the remainder is void, although *A.* and *B.* never have a ſon, but a daughter only; for ſuch a remote contingency tends to create a perpetuity, *Burgis v. Burgis*, 115

See Contingent Remainder, Deviſe, Eſtate, Bargain and Sale, Covenant to ſtand ſeiſed, and Limitation.

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1. In debt for rent, a ſuſpenſion of the rent may be given in evidence, on *nil debet* pleaded, *Anonymous*, 35. 118

2. A landlord may aver taking cattle on a diſtreſs for rent, without ſhewing them *levant et couchant*, *Jordan v. Martin*, 63

3. A rent to a man and his heirs iſſuing out of gavelkind land, ſhall go according to the cuſtomary deſcent of the land, and not according to the courſe of the common law, *Randal v. Jenkins*, 97

4. A rent granted by a remainder-man, is barred by a common recovery ſuffered by the tenant in tail, *Benſon v. Hodſon*, 110

5. An

5. An executor may bring debt for rent in the *debet et detinet* againſt the adminiſtrator *de bonis non* of the undertenant of a term for rent incurred in his own time, *Prattle v. King*, 185

REQUEST.

An action for keeping a paſſage ſtopped up ſo that the plaintiff could not cleanſe his gutter, will not lie until a requeſt has been made to have the paſſage opened, 27

RESERVATION.

If a reſervation be of an heriot *or* forty ſhillings to the leſſor and his aſſigns, at the election of the leſſor, his heirs and aſſigns, yet the deviſee of the leſſor ſhall not have either the heriot or the forty ſhillings, 216

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See Sheriff.

S.

SCANDALUM MAGNATUM.

1. AN action lies on the ſtatute of 2. Rich. 2. c. 5. for ſaying of a peer of the realm, that "he is an unworthy perſon, and does things againſt "law and reaſon," *Ld. Townſend v. Dr. Hughes*, 233

2. The Court will not grant a new trial in an action on this ſtatute on the ground of exceſſive damages, *ibid.* 232

SCHOOL.

1. By 1. Jac. 1. c. 4. ſ. 9. no perſon ſhall keep any ſchool except a public or free grammar-ſchool, &c. except the ſame be ſpecially licenſed by the biſhop, *Bates v. Kendal*, 3

2. By 19. Geo. 3. c. 44. no diſſenter ſhall hold the maſterſhip of any college or ſchool of royal foundation founded ſince the 1. Will. & Mary, *ibid.*

3. A perſon may ſet up a ſchool, although it be to the prejudice of another ſchool previouſly eſtabliſhed in the ſame place, *Yard v. Ford*, 69

SCIRE FACIAS.

1. On a *ſcire facias* upon a recognizance in chancery, if there be demurrer as to part, and iſſue as to part, judgment muſt be given in the king's bench upon the whole record, *Jefferſon v. Dawſon*, 29

2. Error will lie to the exchequer-chamber on a *ſcire facias* in any action within the ſtatute of 27. Eliz. c. 8. *Skinner v. Webb*, 79

3. If after judgment affirmed on a writ of error the plaintiff become bankrupt, and the judgment be *aſſigned*, and then the plaintiff levies execution, the Court will detain the money, in order to afford *the aſſignees* an opportunity of proving their title to it in a *ſcire facias*, *Monk v. Morris*, 93

4. A *ſcire facias* returnable *ad prox. parliament.* is good, 106

5. If judgment be obtained by huſband and wife, the huſband, on the death of his wife, may take out execution without *ſcire facias*, *Miles's Caſe*, 179

6. To a *ſcire facias* brought by an executor on a judgment obtained by the teſtator, the defendant cannot plead that a *ca. ſa.* iſſued againſt him, and that on being arreſted on it he paid the condemnation-money to the warden of THE FLEET, *Compton v. Ireland*, 194, 195

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The ſeal being broken off a deed will not prevent its being given in evidence, 11

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1. On a ſerjeant at law being called, THE RINGS given to the Chief Judges ought to weigh *twenty ſhillings* each, 9

2. In what caſe a *ſerjeant at law* may be returned as a juror, 226. 276

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The juriſdiction of the ſeſſions reſpecting maſter and apprentices, 2. 287

SET-OFF.

1. If a defendant die between verdict and *day in bank*, leaving a creditor his executor, ſuch executor cannot ſet-off his debt in a *ſcire facias* on the judgment, *Burne v. Holden*, 6

2. By 8. Geo. 2. c. 24. when there are mutual debts between a plaintiff and defendant, one debt may be ſet againſt the other, and either pleaded in bar or given in evidence, 215 *notis*

3. A debtor to a bankrupt may ſet-off a debt due to him from the bankrupt, 215

SHERIFF.

1. The ſheriff acquires a ſpecial property in goods ſeized under a writ of execution, and may maintain either *trover* for their value or *treſpaſs* for the tortious taking, *Wilbraham v. Snow*, 30

2. But if a ſheriff ſeize goods by virtue of a *fieri facias*, and his office determines, a ſubſequent ſale by him does not change the property (*Sed vide* 29. Car. 2. c. 3.), 31

3. A ſheriff muſt return *cepi corpus* or *non eſt inventus* to a writ of *ca. ſa. Parker v. Welby*, 33

4. A ſheriff's bond conditioned, that if the party appear then the *condition* to be void, is good, although not in the form preſcribed by 23. Hen. 6. c. 9. for the latter words ſhall be rejected as ſurpluſage, *Malevery v. Redſhaw*, 35

5. An action on the caſe will not lie againſt a ſheriff for returning *cepi corpus* when he had let the party to bail; and he may either *demur*, or plead 23. Hen. 6. c. 10. in *bar*, *Parker v. Welby*, 57

6. The ſame point decided in *Page v. Tulſe*, 240

7. A ſheriff's bond for *eaſe and favour* was void at the common law, and is now made void by 23. Hen. 6. c. 9. *The Marſhal v. Middleton*, 111, 112

8. An action lies againſt a ſheriff, though out of office, for not delivering a writ of *ſuperſedeas* to his ſucceſſor, by reaſon of which the plaintiff's goods are taken in execution, *Calthrop v. Philips*, 222

9. By 20. Geo. 2. c. 37. all ſheriffs ſhall, at the expiration of their office, turn over to the ſucceeding ſheriffs, by indenture and ſchedule, all ſuch writs and proceſs as remain in their hands, &c. 222 *notis*

10. No ſheriff ſhall be called upon to make a return, except within ſix months after his office expires, *ibid.*

11. The 23. Hen. 6. c. 10. which authoriſes ſheriffs to diſcharge priſoners upon "reaſonable ſureties of "ſufficient perſons having ſufficient "in the county," is to be conſtrued for the benefit of ſheriffs, and therefore no action lies for taking ſureties that are inſufficient, or that do not inhabit within the county: but if the ſheriff do not bring in the body at the return of the writ, or ſuffer him to go at large without authority, he is liable to an action, *Ellis v. Yarborough*, 228

12. By 4. & 5. Anne, c. 16. ſheriffs are impowered to aſſign *bail-bonds* as therein deſcribed, 229 *notis*

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SHIP.

1. The maſter of a ſhip is a common carrier, and liable, in an action on the caſe, for the value of goods which he has received on freight, on their being ſtolen by open force and violence from on board his ſhip while lying in the river *Thames*, *Mors v. Sluce*, 85

2. By 7. Geo. 2. c. 15. no *owner* ſhall be liable on account of embezzlement by maſter or mariners beyond the value of the ſhip and freight, *Mors v. Sluce*, 85 *notis*

3. If a mariner or ſhip-carpenter run away from the ſhip he loſes his wages, 93

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SIX-CLERK.

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STATUTES.

1. The ſtatute 3. Jac. 1. c. 7. againſt attornies delaying their clients cauſes, or demanding more than their due, although it only ſays, that "the party "grieved ſhall have his action againſt "ſuch attorney, and recover therein "coſts and treble damages," yet if he take more than his fees extorſively, a penal information will lie againſt him on the ſtatutes of *Weſtminſter* againſt extortion, *Troy's Caſe*, 5

2. Whenever a ſtatute makes a thing criminal an information will lie upon that ſtatute, though not given by expreſs words, *Troy's Caſe*, 6

3. The ſtatute of 12. Car. 2. c. 17. for confirming and reſtoring miniſters, does not extend to livings without the cure of ſouls, *Prin v. Heath*, 12

4. The reſtraints of 5. Eliz. c. 2. againſt exerciſing a trade without having ſerved *as* an apprentice, do not extend to perſons carrying on trades in country villages, *Turneth's Caſe*, 26

5. If a ſtatute create a *new offence*, and inflict a penalty to be recovered by "bill, plaint, or information," yet an *indictment* will lie, except there be the negative words, "and not otherwiſe," *Croſton's Caſe*, 34

6. So where a *new offence* is prohibited by a general prohibitory clauſe in a ſtatute, an indictment will lie, 34 *notis*

7. So if a ſtatute preſcribe a particular mode of puniſhing an *old offence*, ſuch particular mode is *cumulative*, and does not take away the common-law method of proceeding by indictment, 34 *notis*

8. But where a ſtatute enacts, that the doing an act not puniſhable before ſhall for the future be puniſhed in ſuch and ſuch a particular manner, then the common-law method by indictment cannot be purſued, *Hartley v. Hooker*, 34 *notis*

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10. A ſtatute giving juriſdiction to an inferior court does not thereby exclude the juriſdiction of the king's bench, *Smith's Caſe*, 45

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